FILED

(1) 01-721 SEP 24 2001

OFFICE OF THE CLERK

# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

No.: _____

NORMAN M. ROBERTSON, et als.

Appellants,

v.

LARRY BARTELS, et als.

Appellees.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY*

## JURISDICTIONAL STATEMENT

**NORMAN M. ROBERTSON**
Suite 102B
Overlook at Great Notch
150 Clove Road
Little Falls, NJ 07424
(201) 709-1390
**Appearing Pro Se**

**JAMES A. ROBERTSON**
Kalison, McBride, Jackson
& Murphy, P.A.
645 Martinsville Road
Liberty Corner, NJ 07938
(908) 647-4600
**Attorneys for Appellants**

1410 PP

## QUESTIONS PRESENTED

1. Can incumbent legislators be classified by race and afforded different levels of "incumbent protection" without subjecting the redistricting plan to strict scrutiny under the Fourteenth Amendment Equal Protection Clause?
2. Will a redistricting plan survive strict scrutiny when race has been used as a classification and a finding has been made that there is no majority bloc voting?
3. Does the Voting Rights Act require the protection or promotion of certain specific candidates or incumbents to the exclusion of others based upon their race – especially in the absence of majority bloc voting?
4. Does the use of traditional redistricting principles in other parts of the state preclude an inquiry into the use of race as a classification or as a predominant factor in a particular legislative district?
5. Does a redistricting challenge based on minority voter dilution claims brought the day following enactment and which are tried and decided within 20 days thereafter preclude the hearing of Equal Protection claims brought by other plaintiffs 16 days after enactment?
6. Did the District Court here grant summary judgment despite the existence of material questions of fact relating to the use of racial classifications and without permitting the development of a factual record addressed to the Equal Protection claims in conflict with the Supreme Court's holdings in *Hunt v. Cromartie*, 526 U.S. 541 (1999) and other cases?

## Parties to the Proceeding

The parties to the proceeding below are as follows:

NORMAN M. ROBERTSON, JOHN COIRO, EUGENE KULICK, GARRY COLLETTI, JAY R. SCHWARTZ, GERALD ZECKER and DENNIS E. GONZALEZ,

Plaintiffs/Appellants,

v.

LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacities as Members of the State of New Jersey Apportionment Commission, the STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DeFOREST B. SOARIES, JR., Secretary of State of New Jersey, and JOHN FARMER, Attorney General of the State of New Jersey,

Defendants/Appellees.

## Table of Contents


| | |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF CITED AUTHORITIES | v |
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF MATERIAL FACTS | 3 |
| The Redistricting Process | 3 |
| Attacks on the Apportionment Plan | 10 |
| ARGUMENT | 12 |
| 1. Traditional Equal Protection Analysis | 12 |
| 2. Racial Classification of Incumbents | 19 |
| 3. Race as the Predominant Factor in District 34 | 21 |

4. The District Court Granted Summary Judgment Despite the Existence of Questions of Fact and in Conflict With the Court's Holding in *Hunt v. Cromartie*. 22

5. Res Judicata and "Virtual Representation." 23

THE QUESTIONS ARE SUBSTANTIAL 26

CONCLUSION 27

## Table of Cited Authorities


| | |
|---|---|
| *Anderson v. Liberty Lobby, Inc.*<br>477 U.S. 242 (1986) | 22 |
| *Arlington Heights v. Metropolitan Housing Devel. Corp.*<br>429 U.S. 252 (1977) | 22 |
| *Bush v. Vera*<br>517 U.S. 952 (1996) | 13, 17, 19 |
| *City of Richmond v. J. A. Crosson Co.*<br>488 U. S. 468 (1989) | 14, 16, 17, 20 |
| *Contractors Assn. Of Eastern Pennsylvania v. City of Philadelphia*<br>91 F.3d 586 (3d Cir. 1996) | 16 |
| *Hunt v. Cromartie*<br>526 U.S. 725 (1999) | 22 |
| *Karcher v. Daggett*<br>462 U.S. 725 (1983) | 19 |
| *King v. State Bd. of Elections,*<br>979 F. Supp. 582 (N.D. Ill. 1996),<br>*vacated* 519 U.S. 978 (1996) (*King I*) | 17-19 |
| *King v. State Bd. of Elections,*<br>979 F.Supp. 619 (N.D. Ill. 1997),<br>aff'd 522 U.S. 1087 (1998) (*King II*) | 17-19 |

*Loving v. Virginia*
388 U.S. 1 (1967) 13

*McLaughlin v. Florida*
379 U.S. 184 (1964) 13, 16

*Miller v. Johnson*
515 U.S. 900 (1995) 13

*Mississippi Univ. for Women v. Hogan*
458 U.S. 718 (1982) 14

*Palmore v. Sidoti*
466 U.S. 429 (1984) 13, 16

*Personnel Administrator v. Feeney*
442 U.S. 256 (1979) 14

*Regents of Univ. of California v. Bakke*
438 U.S. 265 (1978) 14, 16

*Shaw v. Hunt*
517 U.S. 899 (1996) 13, 17

*Shaw v. Reno*
509 U.S. 630 (1993) 13, 24

*Shelley v. Kraemer*
334 U.S. 1 (1948) 20

*Thornberg v. Gingles*
478 U.S. 30 (1986) 15, 18

*United States v. Athlone Industries, Inc.*
746 F.2d 977 (3d Cir. 1984) 25

*Wygant v. Jackson Bd. of Educ.*
476 U.S. 467 (1986) 14, 16

**IN THE SUPREME COURT OF THE UNITED STATES**

---

OCTOBER TERM, 2001

---

No.: _____

NORMAN M. ROBERTSON, et als.

Appellants,

v.

LARRY BARTELS, et als.

Appellees.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY*

---

# JURISDICTIONAL STATEMENT

---

## OPINION BELOW

The opinion of the district court (App. 1a-38a) is reported at 8 F. Supp. 2d 443 (D.N.J. 2001).

## JURISDICTION

This action was brought on April 26, 2001 in the United States District Court for the District of New Jersey as a challenge to the constitutionality of a statewide legislative redistricting plan adopted by the New Jersey Apportionment Commission on April 11, 2001. A three -judge court was ordered pursuant to the provisions of 28 U.S.C. sec. 2284. The district court entered an order on June 14, 2001 (App. at 45a) granting summary judgment in favor of the defendants on counts one and two of the three count complaint. The third count was referred to a one-judge court for disposition and is not the subject of the present appeal. A notice of appeal to this Court was filed with the district court on July 26, 2001 (App. at 48a). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1253 which provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceding required by any Act of Congress to be heard and determined by a district court of three judges. "

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF MATERIAL FACTS

**The Redistricting Process**

After each decennial census of the United States, the New Jersey Apportionment Commission is required to certify new Senate and Assembly districts and to apportion the senators and Members of the General Assembly among them. The Approtionment Commission is a body constituted pursuant to Article IV, Section III of the Constitution of the State of New Jersey and is comprised of ten members "five to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election."

The 2001 Apportionment Commission initially consisted of five Democrats and five Republicans. Article IV, Section III of the New Jersey Constitution empowers the Chief Justice of the New Jersey Supreme Court to appoint an eleventh member to the Apportionment Commission in the event that the Commission fails to certify the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly in a timely fashion or in the event that the Commission certifies to the Chief Justice that it is unable to do so.

In or about November, 2000, the state committee chairmen of the New Jersey Republican and Democratic parties appointed representatives to serve on the Apportionment Commission. The defendants, Richard Codey, Sonia Delgado, Thomas Giblin, Lewis Greenwald and Bonnie Watson Coleman were appointed by the state chairman of the New Jersey Democratic State Committee.

During the period in and around February, 2001 through and including March 26, 2001, the ten-member Apportionment Commission held several meetings at which the Democratic members refused to exchange with Republican members a map setting forth their proposed districts. Citing the impasse, on or about March 27, 2001, the Chief Justice of the New Jersey Supreme Court appointed the defendant, LARRY BARTELS, to be the Eleventh Member of the Apportionment Commission.

Following the appointment of the Eleventh Member, the Apportionment Commission met and considered the question of the release of proposed maps to the public for comment at a public meeting. Defendant BARTELS and defendants Codey, Delgado, Giblin, Greenwald and Watson-Coleman supported keeping the proposed maps away from public view and inspection.

During the period April 2, 2001 through April 11, 2001, the Apportionment Commission met at the Doral Forestal in Princeton Junction, New Jersey. During this period, the Eleventh Member met separately with the Republican and Democratic commissioners and considered a variety of redistricting plans submitted by both groups.

At or about 10:30 P.M. on April 11, 2001, the Apportionment Commission met on less than one hour's notice to vote on a redistricting plan. Theretofore, no proposed plans had been released to the public. No public comment was entertained by the Commission at this late-night meeting despite a request from Senator Robertson to be heard. The Commission chair, defendant Codey, refused to entertain either debate or questions concerning the plan from the lone Republican commissioner present.

A redistricting plan "NJ2001" was adopted by the Apportionment Commission by a 6 to 1 vote with defendants Bartels, Codey, Delgado, Giblin, Greenwald, and Watson-Coleman voting in the affirmative.

As the Eleventh Member, Professor Bartels was critical in the approval of a final plan. In fact, the District Court referred to Bartels as one "who plainly was the controlling party in the redistricting process." App. at 6a. In a certification in a related proceeding (*Page et als. v. Bartels, et als.*, Civil Action No. 01-1733), Professor Bartels submitted a certification dated April 15, 2001 in which he spelled out the reasons for his actions. *See* App. at 52a-66a.

In his certification defendant Bartels made several statements that evidenced his use of race as a classification for incumbent legislators.

- "I was . . . determined not to adopt any plan that would significantly threaten the reelection chances of incumbent *minority* legislators." Para. 12. (emphasis supplied).

- "I was (and am) convinced that every *minority* incumbent who seeks reelection in 2001 under NJ2001 has a strong opportunity to be reelected." Para. 12. (emphasis supplied).

- "I considered the incumbency of current members of the Legislature to be relevant with respect to *minority* representation, partisan balance, and minimizing voter disruption. The plan adopted by the commission, NJ2001, produces one forced primary and a handful of other difficult reelection contests, *but does not seem to me to pose any significant threats to minority representation.*" Para. 22 (emphasis supplied).

In furtherance of his goal of protecting incumbents and candidates who were members of minority groups, Professor Bartels went so far as to dispatch his legal counsel to consult with "three allegedly endangered minority legislators" to discuss their chances in the upcoming election. All three were likely general election opponents to current 34th District incumbents. Assemblywoman Nia Gill was expected to challenge Senator Norman M. Robertson and Assemblyman LeRoy Jones was expected to challenge Assemblyman Gerald Zecker. Thirty-fourth district incumbent Assemblywoman Marion Crecco was placed in another district.

The three consulted legislators, Nia Gill, LeRoy Jones and Ronald Rice are all African-Americans. The three incumbents who were not consulted, Robertson, Zeckere and Crecco, are all Caucasian.

In paragraph 12 of his certification, Professor Bartels stated that he weighed his counsel's discussion with the African-American legislators before approving a plan. It was only after he received assurances from the minority legislators that tthey could easily win the new proposed districts that Professor Bartels decided to support the final plan.

It is important to note that the policy of protecting incumbents who were members of minority groups was carried out without regard to party affiliation. Senator Robertson was told by a Republican member of the Commission that two 34th District towns, Little Falls and Wayne, would be leaving the district so that they could be used to connect a neighboring Essex County town to a heavily Republican area in Bergen County.

Robertson was told that the reason for the change was to provide a safe district for Republican Assemblyman Kevin O'Toole. Robertson was told by the Commissioner that Mr.

O'Toole's mother is Korean and he was therefore considered by the Eleventh member to be minority Asian and entitled to protection.

Professor Bartels also used race as a classification for candidates. In paragraph 6 of his certification, he stated "In the process of evaluating competing redistricting proposals, I paid close attention to racial and ethnic data and electoral opportunities." He also declared that "I was determined to examine possibilities for expanding minority representation." Para. 12.

In paragraph 12 of his certification, defendant Bartels goes on to observe that: "I believe that NJ2001 is superior to GOP-H20 (or any other plan proposed by the Republicans) in terms of creating *new* opportunities for minority candidates to win seats in the Legislature." Bartels Certification, para. 12 (emphasis in the original).

The "new opportunities for minority candidates to win seats" created by the Bartels plan were intended to be found in district 34 in which race was the predominant consideration.

While attempting to protect all other minority incumbents, the Bartels plan placed 27th district incumbents Assemblywoman Nia Gill of Montclair and Assemblyman LeRoy Jones of East Orange (both African-American) into District 34 with Senator Norman M. Robertson and Assemblyman Gerald Zecker In doing so, the Bartels plan removed four strong Republican towns from the current 34th district and replaced them with two large Democratic strongholds – East Orange and Montclair. The result is a district that is lopsided enough to serve the defendants' race-based objective.

Clearly, traditional redistricting criteria were subordinated to race in the construction of District 34. Although the plan adopted did not appear to violate the New

Jersey constitutional requirements of contiguity, compactness and respect for municipal boundaries, everything else took a back seat to race as a consideration. This was true even of the factors cited by defendant Bartels in his certification. Consider the following:

- **Equal Population**: The "ideal" population for a legislative district following the 2000 census is 210,359. Bartels certification, para. 11. The current District 34 contains 208,442 inhabitants. The district 34 proposed in the Bartels plan contains only 205,731.

- **Avoiding Partisan Bias**: Defendant BARTELS stated in his certification that both the Republican and Democratic plans "seemed approximately unbiased, with a slight advantage for NJ2001 (since the modest bias that appears in NJ2001 seems to work *against* the party that supported the plan)." Bartels Certification, para. 18.

- **Competitiveness and Responsiveness**: Defendant Bartels noted in his certification that "In each plan the partisan balance of competitive races was approximately even. . . . Adjustments for incumbency (or for incumbency plus turnout differentials) significantly increased the number of projected competitive races under both plans, but did not clearly favor either plan over the other with respect to competitiveness or responsiveness." Bartels Certification, para. 18. The current District 34 is quite competitive. It was carried by Republican Governor Whitman in 1997 by 7,437 votes and by Democratic Vice President Gore in 2000 by 4,953. The 34$^{th}$ District proposed by the Bartels plan is far less competitive. The towns in the proposed district gave Democrat McGreevy a 13,399 vote plurality over

Republican Whitman in 1997 and supplied Democrat Gore with a 29,004 vote victory over Republican Bush.

- **Minimizing Voter Disruption**: Defendant Bartels noted in his certification that approximately 58% of New Jerseyans would be able to vote (or not vote) for all three of their current incumbent legislators under the Republican plan and approximately 66% under the plan he and the other commissioner defendants adopted. Bartels certification, para. 21. The proposed District 34 stands in stark contrast to these numbers. NONE of the residents of the old or new District 34 will be able to consider all three of their incumbents. The voter disruption is total.

Most disturbing is the fact that defendant Bartels and the other commissioner defendants totally ignored the traditional redistricting principle of "community of interest' when constructing their proposed District 34. East Orange was torn away from its traditional Essex County neighbors of Orange, West Orange and South Orange and placed in a district with the Passaic County towns of Clifton and West Paterson – towns with which East Orange has little in common racially, demographically, socially or economically.

The Mayors of three Passaic County towns are plaintiffs in this action. They are from the three "Passaic Valley" towns of Little Falls, Totowa and West Paterson. These towns enjoy a similar history, similar demographics, shared media, and shared institutions. Their children go to the same high school, Passaic Valley High School. The towns look to share services and to engage in all manner of regional cooperation.

Under the Bartels plan, Totowa, West Paterson and Little Falls will be sent to three different legislative districts. These districts have their centers of gravity in three different counties.

This absurd result came as a consequence of race being the predominant consideration in the construction of District 34. As a result, the Passaic Valley towns will see their collective influence in Trenton vastly and unfairly diminished.

The Bartels plan also totally disregarded the traditional respect for county boundaries. Despite the language of the New Jersey Constitution which states that "each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties," (N.J. Const. Art. IV, Sec. II, para. 1), defendant Bartels and the other commissioner defendants ignored plans that would have resulted in a District 34 that was far truer to county lines. This would have been far more consistent with New Jersey's history and to traditional principles of redistricting.

**Attacks on the Apportionment Plan**

On April 12, the morning following the late-night vote on the plan, an action was brought on behalf of minority voters and their Republican supporters challenging the new apportionment. *Page et als v. Bartels et als.*, Civil Action No. 01-1733 (DRD). None of the plaintiffs in the present action were represented in the *Page* case, nor were any of the present plaintiffs in privity with any of the Page plaintiffs. Each of the four counts of the *Page* complaint alleged the dilution of minority voting power in violation of various statutory and constitutional provisions. A copy of the *Page* complaint is included in the Appendix at 54a.

A three-judge court was not requested by the original trial judge in the Page case because he felt that the case was so immersed in Voting Rights law that there were no Equal Protection arguments before him. The Third Circuit Court of appeals reversed this holding and ordered the three-judge court.

Since Equal Protection arguments were not being made in the *Page* case, Senator Robertson and the other plaintiffs filed their own action on April 27, 2001, 16 days after the enactment of the redistricting plan. The first two counts of the complaint challenged the plan on Equal Protection grounds. The first count claimed that race was the predominant consideration in the deconstruction and reconstruction of District 34. The second count claimed that incumbent legislators were classified by race and afforded a different level of "incumbent protection." A copy of the text of the *Robertson* complaint is included in the Appendix hereto at 91a.

The minority voter dilution claims of the *Page* case were heard by the district court at breakneck speed. A full trial on these issues took place on April 30 and May 1 and a decision was announced by the court on May 2. In a written opinion dated May 4, the court in *Page* cited *Thornburg v. Gingles*, 478 U.S. 30, 54 (1986) and found that "there was no credible evidence presented [at trial in *Page*] that 'a white bloc vote [in the new Districts 27, 28, 29 and 34] normally will defeat the combined strength of minority support plus white crossover votes.'"

No trial was ever held on the Equal Protection challenges to the New Jersey redistricting plan raised in the *Robertson* complaint. A motion for summary judgment was brought by the defendants on May 21, 2001. After weighing the competing certifications and considering the evidence brought forth at trial in the *Page* matter, the court below entered summary judgment on behalf of the defendants on the Equal Protection counts.

Despite the competing certifications – and the earlier certification of Professor Bartels, the court held that there were no material issues of fact that would preclude the granting of summary judgment. The court also held that the application of certain traditional principles of redistricting in the overall plan

served to defeat claims of race as the predominant factor in District 34 and disparate treatment of incumbents. Moreover, the court held that the Equal Protection claims brought herein just 16 days after the plan's adoption were precluded by the disposition of the voter dilution claims in *Page* under principles of *res judicata* and "virtual representation."

## ARGUMENT

### 1. Traditional Equal Protection Analysis

Legislative reapportionment is one of the most fundamental and important functions of government. Great care should be taken to give full voice to those wishing to be heard on this subject. This is especially true of those whose dissent from redistricting is based on constitutional grounds.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, sec. 1. This Court has extended these Equal Protection guarantees to cases involving the redistricting of legislative bodies. See, e.g. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941, 135 L. ed. 2d 248 (1996), *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); *Miller v. Johnson* 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

It is critical to note that the extension of Fourteenth Amendment guarantees to the redistricting setting is simply the logical extension of traditional Equal Protection principles. Unfortunately, the district court in the present case lost sight of traditional principles in its application of Supreme Court

redistricting precedent. Nowhere is this more true than in the court's failure to recognize the importance of racial classifications to an Equal Protection analysis of redistricting questions. Reference to the analysis of areas outside of legislative redistricting is instructive.

"A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 1882, 80 L. Ed. 2d 421 (1984); *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S.Ct. 283, 290, 13 l. Ed. 2d 222 (1964); *Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 1823, 18 L. Ed. 2d 1010 (1967). See also *Miller v. Johnson*, 515 U.S. 900, 904, 115 S.Ct. 2475, 132 L. Ed. 2d 762, 771 (1995) (The "central mandate" of the Equal Protection Clause "is racial neutrality in governmental decision making.").

One does not have to be part of a discreet and insular minority to qualify for various types of governmental protection. The United States Supreme Court has held:

> "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."

*Regents of Univ. of California v. Bakke*, 438 U.S. 265, 289-90, 98 S.Ct. 2733, 2748, 57 L. Ed. 2d 750 (1978). See also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 467, 273, 106 S.Ct. 1842, 1846, 90 L. Ed. 2d 260 (1986) ( "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."), *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724, n.9, 102 S.Ct. 3331, 3336, n.9, 73 L. Ed. 2d 1090 (1982).

Racial classifications are often used to combat the disease of discrimination. However, the law recognizes that the use of race

as a classification imposes an additional burden on others because of the color of *their* skin. For a government to say that an action is "remedial" without more fails to understand the true and universal reach of the Equal Protection guarantee.

> "Absent searching judicial inquiry into the justification of race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority, ***or simple racial politics***."

*City of Richmond v. J. A. Crosson Co.*, supra, 488 U.S. 468, 493, 109 S.Ct. 706, 721 (emphasis added). See also, *Personnel Administrator v. Feeney*, 442 U.S. 256, 272, 99 S.Ct. 2282,, 2292, 60 L. Ed. 2d 870 (1979) ("A racial classification, regardless of its purported motivation is presumptively invalid and can be upheld only upon an extraordinary justification.").

Professor Bartels misunderstood the meaning and reach of the Voting Rights Act and the Constitution when he formulated his racial classification of incumbents and his race-based deconstruction and reconstruction of District 34. In paragraph 12 of his certification in the *Page* case he stated:

> "African-Americans, Hispanics, and other racial and ethnic minority groups protected by the Voting Rights Act and the Federal Constitution are not currently represented in the New Jersey Legislature in proportion to their statewide population. I was therefore determined not to adopt any plan that would significantly threaten the reelection chances of incumbent minority legislators and furthermore, I was determined to examine possibilities for expanding minority representation. . . . Taking all [the applicable] evidence into account, I was (and am) convinced that every minority incumbent who seeks reelection in 2001 under NJ2001 has

> a strong opportunity to be reelected. Moreover, I believe that NJ2001 is superior to GOP-H20 (or any other plan proposed by the Republicans) in terms of creating new opportunities for minority candidates to win seats in the Legislature." App. at 49a.

Professor Bartels failed to understand that the Constitution protects *all* groups, not just "Aftican-Americans, Hispanics, and other racial minority groups." Moreover, he appears unaware that Voting Rights Act remedies are not invoked in response merely to the proportion of minority legislators to the minority population of the state as a whole. *See Thornburg v. Gingles,* 478 U.S. 30 (1986). After all, a majority-minority legislative district could choose a Caucasian as its representative as they hav edone for more than a decade in New Jersey's 27th Senate District.

Although well intended, Professor Bartels's remedies with respect to minority legislators became nothing more than "simple racial politics." This is even more clear when one attempts to apply strict scrutiny to the New Jersey plan.

It has been held that a racial classification will be upheld only when it is "narrowly tailored" to serve a "compelling state interest." *City of Richmond v. J. A. Crosson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L. Ed. 2d 854 (1989); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 106 S.Ct. 1842, 90 L. Ed. 2d 260 (1986); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L. Ed. 2d 750 (1978); *Contractors Assn. of Eastern Pennsylvania v. City of Philadelphia*, 91 F. 3d 586 (3d Cir. 1996). *See also*, *Palmore v. Sidoti*, 466 U.S. 429, 432-33, 104 S.Ct. 1879, 1882, 80 L. Ed. 2d 421 (1984) ("Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the

accomplishment' of the legitimate purpose.") quoting *McLaughlin v. Florida*, 379 U.S. 184, 196, 85 S. Ct. 283, 290. 13 L. Ed. 2d 222 (1964).

In the present case, two things can trigger the application of the strict scrutiny standard: (1) the use of race as a classification for the treatment of incumbents; and (2) the use of race as the predominant factor in the drawing of District 34 to the subordination of traditional principles of redistricting. Once properly subjected to this strict scrutiny, the New Jersey reapportionment plan must fail.

It will no doubt be alleged that the compelling state interest is the state's compliance with the requirements of the Voting Rights Act of 1965, 42 U.S.C.A. sec. 1973 et seq. However, traditional Equal Protection analysis reveals that the mere invocation of the Act (or any other laudable goal) is not sufficient.

> "[T]he mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight . . . Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice. . . . [W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals."

*City of Richmond v. J. A. Crosson Co.*, supra, 488 U.S. at 500, 109 S. Ct. at 725.

Fortunately, a roadmap has been provided by a federal three-judge panel in Illinois in *King v. State Bd. of Elections*, 979 F. Supp. 619 (N. D. Ill. 1997), *aff'd* 522 U.S. 1087. 118 S. Ct. 877, 139 L. Ed. 2d 866 (1998). The *King* case involved a court-ordered Congressional redistricting which included an Hispanic majority-minority district. An initial

adjudication of constitutionality was vacated by the Supreme Court and remanded back to the court for further consideration in light of *Shaw v. Hunt* and *Bush v. Vera* . *See King v. State Bd. of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996), *vacated* 519 U.S. 978, 117 S. Ct. 429, 136 L. Ed. 2d 328 (1996).

On remand the court in *King II* found that compliance with section 2 of the Voting Rights Act could constitute a compelling state interest. 979 F. Supp. At 622. See also, *Bush v. Vera*, 517 U.S. at 994, 116 S. Ct. at 1970 (O'Connor, J. concurring). When applying the "narrow tailoring" standard, however, the court in *King II* noted the true reach of the Equal Protection demands:

> " Read together, *Shaw II* and *Bush* reveal the following precept for narrow tailoring inquiries under section 2: A section 2 district is narrowly-tailored if (1) at a minimum, the district remedies the anticipated violation or achieves section 2 compliance, and (2) its consideration of race is no more than reasonably necessary to fulfill its remedial purpose.
>
> * * *
>
> "In order to support this conclusion in the wake of *Shaw II* and *Bush*, the record must demonstrate that (1) there was a "strong basis in evidence" for finding the threshold conditions for section 2 liability . . . "

979 S. Supp. At 623.

The threshold conditions for section 2 liability were found by the *King II* court to be those set forth in *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766, 92 L. Ed. 2d 25 (1986). Thus:

> "A district cannot be held to remedy a potential section 2 violation if the minority group contained therein is

> not (1) "geographically compact;" (2) "politically cohesive;" and (3) potentially barred by majority bloc voting form electing its preferred candidate, absent the existence of the district."

979 F. Supp. at 624.

In Illinois, as in New Jersey, the minority groups were geographically compact and politically cohesive. However, in Illinois, unlike New Jersey, an "ecological regression analysis" performed by Dr. Allan J. Lichtman demonstrated to the court "a definite and continuing pattern of white racial-block voting" against minority (Hispanic) candidates. *See King I*, 979 F. Supp. at 613. In Essex County, New Jersey, the same Dr. Allan J. Lichtman came to a very different conclusion about majority bloc voting and the district court in *Page* found no credible evidence of its existence.

The current redistricting plan must certainly fail the strict scrutiny standard. The use of race here to classify incumbents or as a predominant factor in the deconstruction and reconstruction of District 34 in subordination of traditional principles of redistricting just was not necessary. It was not necessary to comply with the Voting Rights Act or for any other purpose that has been recognized as a compelling state interest. Even Professor Bartels admitted that both the Republican and Democratic plans complied with the Act.

### 2. Racial Classification of Incumbents

The Supreme Court has recognized incumbency protection as a legitimate state goal in the redistricting process. *See, e.g., Bush v. Vera*, 517 U.S. 952, 964, , 116 S. Ct. 1941, 1954, 135 L.Ed.2d 248 (1996); *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S. Ct. 2653, 2663, 77 L. Ed. 2d 133 (1983). Policies may vary from state to state, but it is critical that the policy be applied in

a consistent, evenhanded manner to *all* incumbents. The Equal Protection Clause of the Fourteenth Amendment requires it.

Professor Bartels's certification and the plan itself clearly evidence a plan to protect all minority legislators regardless of party. This was done at the expense of non-minority legislators to whom such protection was not afforded. Sadly, such differences in treatment were unnecessary. Such a scheme is subject to strict scrutiny – a test which it cannot pass.

In its opinion, the district court mischaracterized the claims made by plaintiffs with respect to the racial classification of incumbents:

> "Although not expressly stated as such, this argument presents a variation on their first argument, namely that the race of incumbents, rather than voters, was the predominant factor in the Commission's decision to adopt the redistricting plan. Because we find that race, while considered, was not the predominant factor in the Commission's redistricting plan, we also grant the defendant's motion as to Count II."

App. at 32a

The plaintiffs here were not arguing that the race of incumbents was predominant in the Commission's decision. Such an argument is unnecessary. The use of race to classify similarly situated individuals is enough to trigger an Equal Protection strict scrutiny review.

The district court's reliance on the predominant factor test contained in this Court's redistricting rulings is misplaced. The predominant factor test was adopted because redistricting plans are usually neutral on their face and do not contain overt racial classifications. The predominant factor test and others like it were designed to establish whether a redistricting body has

engaged in techniques which were tantamount to racial classification.

When independent evidence of an actual racial classification exists, the predominant factor test should not serve as a stumbling block to relief. The rights that arise under the Fourteenth Amendment run to the individual and are considered personal rights. *City of Richmond v. J. A. Crosson Co.*, 488 U.S. 469, 493, 109 S. Ct. 706, 721, 102 L. Ed. 2d 854 (1989), Shelley v. Kraemer, 334 U.S. 1, 22, 68 S. Ct. 836, 846, 92 L. Ed. 2d 1161 (1948). Every incumbent is entitled to be treated with the same consideration as every other incumbent, regardless of race.

If Assemblyman Zecker had been African-American, or if Senator Robertson's mother had been Asian, they would have been given safe districts under the Bartels rules. In the absence of extraordinary circumstances, such rules must fall.

3. **Race as the Predominant Factor in District 34.**

Over and over again in public statements and in his certification in the *Page* case, defendant Bartels spoke of his commitment to the expansion of opportunities for minority representation. So complete was his commitment that race became the predominant factor in the odd configuration of the new 34th District. Unfortunately, this was done impermissibly to the subordination of traditional principles of redistricting.

The loss of Little Falls and Wayne was done because a Republican Assemblyman's mother is Korean. Other Essex County towns were added in the 34th in order to create a new opportunity for an African-American to win a Senate seat. All but state constitutionally required principles of redistricting were subordinated to the race-based objectives.

### *4.* The District Court Granted Summary Judgment, Despite the Existence of Questions of Fact and in Conflict with this Court's Holding in *Hunt v. Cromartie.*

To the extent that the defendants are deemed to have challenged the allegation of racial classification – and to the extent that they claim that race was not the predominant factor in the deconstruction and reconstruction of District 34 – serious questions of fact exist which require a trial.

In the redistricting case of *Hunt v. Cromartie*, 526 U.S. 541 (1999), the Supreme Court notes that a facially neutral law warrants strict scrutiny if it can be proved that the law was motivated by a racial purpose or object. 526 U.S. at 546.

> "The task of assessing a jurisdiction's motivation, however, is not a simple matter; on the contrary, it is an inherently complex endeavor, one requiring the trial court to perform a 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' "

526 U.S. at 546 quoting *Arlington Heights v. Metropolitan Housing Devel. Corp.*, 429 U.S. 252, 266 (1977).

Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In ruling on such a motion, the nonmoving party's evidence "is to be believed, and all justifiable inferences are to be drawn in [that party's] favor." *Anderson v.*

*Liberty Lobby, Inc.*, 477 U.S. 242 255 (1986). See also, *Hunt v. Cromartie*, 526 U.S. at 552.

Here, Professor Bartels's certification evidenced a policy that utilized the classification of incumbents, and even candidates, by race. The subordination of traditional principles of redistricting in District 34 to the desire to expand opportunities for minority candidates raises serious factual questions as to motive.

In its opinion granting summary judgment, the district court states at one point:

> "{W]e find that the record demonstrates that a trier of fact would be constrained to conclude that the redistricting plan carefully was drawn utilizing traditional redistricting principles while seeking to comply with the Voting Rights Act by giving minority candidates the opportunity to be elected to political office."

If there are facts to be tried, then plaintiffs should have been given the opportunity to develop a record at trial. Summary judgment in this case was inappropriately granted. In the present case, the existence of material issues of fact – especially those dealing with intent – prevent a granting of the defendants' motion for summary judgment.

### 5. ***Res Judicata* and "Virtual Representation."**

The district court's rulings with respect to the *res judicata* effect of the disposition of the *Page* case threatens to do grave injustice to the plaintiffs herein and to generations of Americans who seek to dissent from the actions of those responsible for statewide redistricting. Such plaintiffs will be forced to the sidelines while well organized and well-heeled political machines

proceed at a pace that cannot be matched by the ordinary citizen.

In the present case, none of the plaintiffs were parties to the *Page* case. None of the plaintiffs – including the legislators – were in privity with any of the parties in the *Page* case. None of the plaintiffs here had any control over the decisions made by the Page teams. In fact, the present complaint was brought when it became apparent that certain issues would not be addressed in the Page case.

The *Page* case was brought by and on behalf of minority voters and their mostly Republican supporters and all four counts in the complaint set forth voter dilution claims. The three counts in the present case are completely different and claim violations of the Fourteenth Amendment because of the use of race as a classification for incumbents or as the predominant factor in the construction of District 34. The original case also set forth a claim that the New Jersey one-year in-district residency requirement is unconstitutional.

Although both cases are prompted by the adoption of a redistricting plan by the Apportionment Commission, the factual proofs in the *Page* voter dilution case were much different than those required in the Equal Protection case. As the Supreme Court noted in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed.2d 511 (1993), "Classifying citizens by race, as we have said, threatens special harms that are not present in our voter-dilution cases. It therefore warrants different analysis." 509 U.S. at 649-50. The Equal Protection analysis was not brought before the court in *Page* in the way it is in the present case.

Consideration must also be given to the very unique nature of apportionment challenges. The *Page* case was brought less than 24 hours after the adoption of the plan. It was heard and disposed of in less than three weeks. The present case was filed

within 16 days of the adoption and three days before the plenary hearing in *Page*. The present matter was pursued diligently and the plaintiffs should not be penalized for the rapidity with which an earlier matter was heard.

The issues raised in the present complaint are substantial and important as a matter of public policy. If left undisturbed, the district court's ruling will have the effect of establishing a statute of limitations in redistricting cases that is measured in weeks, if not days. This would be totally unfair to the average plaintiff who has the obligation of investigation prior to filing a complaint.

Legitimate challenges to legislative redistricting are too important to be subjected to a race to the courthouse. Invariably, the winner of the race will be a highly organized political entity with an agenda all its own. Other aggrieved parties, acting diligently and in good faith, should not be bound by all of the tactical and legal decisions of an initial plaintiff with whom they may strongly disagree. How can such parties be precluded from bringing claims that "could have been brought" but weren't by an initial plaintiff whose interests and theirs might sharply diverge?

The public is best served by a thorough analysis of redistricting enactments, not by one that may be fast, but woefully incomplete.

Many of the precedents relied upon by the district court support this view in their own way. In United States v. Athlone Industries, Inc., 746 F. 2d 977 (3d Cir. 1984), the court held:

> "Application of the claim preclusive aspect of the *res judicata* doctrine requires a showing . . . that there has been (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based *on the same causes of action.*

746 F. 2d at 983. (emphasis added). The critical elements are missing in the present case. The parties are different and so are the claims made.

Many aggrieved Americans would be precluded from having their Constitutional rights adjudicated if a distinction is not made between a party who sits on their rights and a plaintiff whose claims are substantively different from an initial plaintiff whose interests may not coincide with his own. How can it be said that an attorney for an initial plaintiff "adequately" represents subsequent claimants when there may be a political or legal conflict of interest?

## THE QUESTIONS ARE SUBSTANTIAL

This case may be one of the first redistricting cases of this decennial cycle. It raises several questions of first impression. Incumbents need to know whether or not they are entitled to the same measure of protection as others similarly situated. Redistricting commissions need to know whether or not they have carte blanche to favor certain candidates over others because of the color of their skin.

Aggrieved parties need to know whether they have any chance at all of having their claims heard when they are faced with a fast moving initial plaintiff who may not wish to bring their particular claims to the fore.

Respectfully, commissions, legislators, candidates and voters all are in need of the Court's guidance in these matters. The political consequences of these redistricting efforts will last for a decade or more. They will effect the political landscape in a way that few other enactments will.

## CONCLUSION

For all of the foregoing reasons, jurisdiction should be noted and consideration of the appeal should be expedited.

Respectfully submitted,

NORMAN M. ROBERTSON
*Appearing Pro Se*

JAMES A. ROBERTSON
*As Attorney for Appellants*
*Coiro, Kulick, Colletti,*
*Schwartz, Gonzalez and*
*Zecker*

**IN THE SUPREME COURT**
**OF THE UNITED STATES**

OCTOBER TERM, 2001

NO.: _____

NORMAN M. ROBERTSON, et als.

Appellants,

v.

LARRY BARTELS, et als.

Appellees.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY*

---

# APPENDIX TO JURISDICTIONAL STATEMENT

---

**NORMAN M. ROBERTSON**
Suite 102B
Overlook at Great Notch
150 Clove Road
Little Falls, NJ 07424
(201) 709-1390
**Appearing Pro Se**

**JAMES A. ROBERTSON**
Kalison, McBride, Jackson
& Murphy, P.A.
645 Martinsville Road
Liberty Corner, NJ 07938
(908) 647-4600
**Attorneys for Appellants**

# Appendix to Jurisdictional Statement

## Table of Contents


| | |
|---|---|
| Opinion of the Court in *Robertson v. Bartels* | page 2a |
| Order Correcting Text of Opinion | page 43a |
| Order Granting Summary Judgment | page 45a |
| Notice of Appeal to the United States Supreme Court | page 48a |
| Certification of Professor Larry M. Bartels in *Page v. Bartels* | page 52a |
| *Page v. Bartels* Verified Complaint | page 67a |
| *Robertson v. Bartels* Verified Complaint | page 91a |

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

No. 01-2024

NORMAN M. ROBERTSON, JOHN COIRO, EUGENE KULICK, GARRY COLLETTI, JAY R. SCHWARTZ, DENNIS E. GONZALEZ, GERALD H. ZECKER

Plaintiffs

v.

LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacities as members of the State of New Jersey Apportionment Commission, the STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DeFOREST B. SOARIES, JR., Secretary of State of the State of New Jersey, and JOHN FARMER, Attorney General of the State of New Jersey,

Defendants.

Argued May 31, 2001

FILED June 18, 2001 at 2:30 P.M.
William T. Walsh, Clerk

BEFORE: MORTON I. GREENBERG, Circuit Judge, and
DICKINSON R. DEBEVOISE and HAROLD A.
ACKERMAN, District Judges
(convened pursuant to 28 U.S.C. § 2284)

(Filed: _____, 2001)

Norman M. Robertson (argued)
Suite 102B
Overlook at Great Notch
150 Clove Road
Little Falls, New Jersey 07501

Appearing Pro Se

James A. Robertson (argued)
Kalison, McBride, Jackson &
Murphy, P.A.
645 Martinsville Road
P.O. Box 814
Liberty Corner, New Jersey 07938

Attorneys for Plaintiffs John Coiro,
Eugene Kulick, Gary Colletti, Jay R.
Schwartz, Dennis Gonzalez and
Gerald H. Zecker

Paul M. Smith (argued)
Sam Hirsch
Jenner & Block LLC
601 Thirteenth Street

Washington, DC 20005Robert E.
Levy
Nomi Lowy
Scarinci & Hollenbeck
500 Plaza Drive
Secaucus, New Jersey 07096

Leon J. Sokol
Steven Siegel
Sokol, Behot & Fiorenzo
433 Hackensack Avenue
Hackensack, New Jersey 07601
Attorneys for Defendants New Jersey
Apportionment Commission,
Richard Codey, Sonia Delgado,
Thomas Giblin, Lewis Greenwald,
Bonnie Watson Coleman & New
Jersey Apportionment Commission

Robert L. Clifford
McElroy, Deutsch & Mahoney
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, New Jersey 07962
Attorney for Defendant Larry Bartels

John J. Farmer, Jr., Attorney General
Donna Kelly, Senior Deputy
Attorney General (argued)
Mark J. Fleming
Assistant Attorney General
Mark Turner Holmes
Deputy Attorney General

Pamela E. Gellert
Deputy Attorney General
Office of the Attorney General of New Jersey
Department of Law & Public Safety
Division of Law
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625

Attorney for Defendants Secretary of State & Attorney General of State of New Jersey

OPINION OF THE COURT

GREENBERG, Circuit Judge.

This matter comes on before this court on the plaintiffs' complaint seeking injunctive relief to prevent the defendants from implementing a redistricting plan for New Jersey's Senate and General Assembly districts. The plaintiffs allege that the redistricting plan violates the First, Fourteenth and Fifteenth Amendments to the United States Constitution. Additionally, they challenge the constitutionality of New Jersey's one-year district residency requirement as a requisite for an individual to be eligible to run for legislative office. The defendants have moved for summary judgment. Because we find that there is no genuine dispute as to any material fact and the defendants are entitled to judgment as a matter of law, we will grant the defendants' motion. We will refer the third

count of the plaintiffs' complaint addressing the residency requirement to a single judge for disposition.

## I. BACKGROUND

This case arises out of the New Jersey Apportionment Commission's (the "Commission") certification on April 11, 2001, of a district map for the State's forty legislative districts to reflect the results of the 2000 federal decennial census. Pursuant to the Constitution of the State of New Jersey, the Senate and General Assembly districts are to be established by a Commission following every federal decennial census. See N.J. Const. Art. 4 § III, ¶ 1. The Commission is comprised of ten members, five appointed by each of the state chairpersons of the two political parties receiving the highest number of votes in the most recent gubernatorial election, here the Democratic and Republican parties. See id.

Following the Commission's appointment in November 2000, it could not agree on a redistricting plan. Therefore, pursuant to the New Jersey Constitution, Art. 4, § 3, ¶ 2, it certified its inability to do so to the Chief Justice of the Supreme Court of New Jersey, who, on or about March 26, 2001, appointed Professor Larry Bartels as the eleventh member. Thereafter, following various meetings, on April 11, 2001, the Commission certified a plan for the State's legislative districts, and on April 12, 2001, filed the plan with the Secretary of State. The Democratic members proposed a plan that essentially was adopted, but Bartels, who plainly was the controlling party in the redistricting process, modified the plan.

That same day, immediately following the filing of the plan, certain plaintiffs who included African-American registered voters and residents of Essex County, Hispanic registered voters and residents of Essex and Hudson counties, and Republican members of the New Jersey Senate and General Assembly,[1] filed a complaint and proposed order to show cause in the district court challenging the plan. See Page v. Bartels, — F. Supp. 2d —, 2001 WL 505187 (D.N.J. May 7, 2001). The plaintiffs in Page pled four counts: (1) that the defendants' actions infringed upon the plaintiffs' rights as protected by § 2 of the Voting Rights Act of 1965; (2) that the plan intentionally violates § 2 of the Voting Rights Act; (3) that ratification and employment of the plan violates the plaintiffs' Due Process and Equal Protection rights as guaranteed by the Fourteenth Amendment to the United States Constitution; and (4) that defendants' actions violated the Fifteenth Amendment to the United States Constitution. The plaintiffs in Page sought an injunction against implementation of the new redistricting plan. Following the resolution of procedural matters not germane to this action except to the extent that the disposition has precedential significance here, see Page v. Bartels, 248 F.3d 175 (3d Cir. 2001), Chief Judge Becker of the Court of Appeals for the Third Circuit convened a three-judge panel to preside over the matter. On April 30-May 1, 2001, the panel presided over the matter. On April

---

[1] The Page complaint described the Republican plaintiffs as "consist[ing] of citizens of the State of New Jersey who have been duly elected as Senators/Assemblymen from previously constituted legislative districts and currently serve in the New Jersey Legislature and comprise the majority of each of the respective houses." Defs.' Mot. For Summ. J. Ex. B (Page Compl. & 18).

30-May 1, 2001, the panel presided over a full evidentiary trial.

Then, on April 27, 2001, a different set of plaintiffs, namely Senator Norman Robertson, the incumbent Republican Senator in District 34, John Coiro, the Mayor of the Borough of Totowa, Eugene Kulick, the Mayor of Little Falls, Garry Colletti, the Mayor of West Paterson, and Jay Schwartz and Dennis Gonzalez, two individuals precluded from running for legislative office because of the one-year district residency requirement, commenced this action. Subsequently, Gerald H. Zecker, an incumbent Republican Assemblyman in District 34, was permitted to intervene as a plaintiff. The plaintiffs' three-count complaint alleged: first, that the proposed District 34 "was constituted with a race-based outcome as the predominant consideration to the subordination of traditional principles of redistricting" in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution; second, that the Commission engaged in purposeful unconstitutional racial discrimination by adopting a redistricting plan that favored certain minority incumbent legislators; and third, that the one-year district residency requirement of Art. IV, § I, of the New Jersey Constitution is an unconstitutional infringement upon First and Fourteenth Amendment rights. Defs.' Mot. For Summ. J. Ex. C at 6-21 (Compl. ¶¶ 14-50).

On May 2, 2001, after the plaintiffs here brought this action, the Page panel denied the plaintiffs in that case all injunctive relief and entered final judgment in favor of the defendants. Then, on May 3, 2001, the plaintiffs in this matter filed an application for an order to show cause seeking a temporary restraining order and a preliminary injunction against implementation of the plan. Judge

Debevoise, however, denied their application for the temporary restraining order, though he did schedule a hearing on the plaintiffs' application for a preliminary injunction for May 15, 2001. Thereafter, on May 7, 2001, Chief Judge Becker appointed a three-judge panel to preside over this matter pursuant to 28 U.S.C. § 2284.[2]

Subsequently, the parties in this case agreed to consolidate the preliminary and permanent injunction hearings. They also agreed, and we ordered, that testimony taken in the Page litigation would be admissible at trial in this action and available for incorporation in the defendants' summary judgment motion. See Defs.' Mot. For Summ. J. Ex. J at 12 (Tr. Of May 16, 2001 Conference).

We heard oral argument on defendants' summary judgement motion on May 31, 2001, following which we orally granted the motion on the first and second counts of the complaint dealing with the redistricting issues. We reserved judgment on the third count pending further briefing by the parties on whether we should refer it to a single judge for disposition. We since have concluded that we should refer that count to a single judge and have entered an order doing so. This opinion sets forth our reasons for taking these actions.

---

[2] Section 2284(a) provides, in relevant part: "A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). The panel originally was comprised of Leonard I. Garth, Circuit Judge, and Dickinson R. Debevoise and Harold A. Ackerman, District Judges, the same panel as in Page. Circuit Judge Morton I. Greenberg subsequently was substituted for Judge Garth.

## II. JURISDICTION

We have jurisdiction pursuant to 28 U.S.C. § 1331, as the plaintiffs filed suit raising claims under the United States Constitution. Because the plaintiffs' claims challenge the constitutionality of the apportionment of a statewide legislative body, pursuant to 28 U.S.C. § 2284, counts one and two are properly heard before a district court of three judges.

## III. DISCUSSION

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In resolving a motion for summary judgment, we are required to determine whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). In making this determination, the evidence of the plaintiffs as the nonmoving parties is to be believed and we must draw all reasonable inferences in their favor. See id. At 255, 106 S.Ct. at 2513. Furthermore, the defendants, as the movants, bear the initial burden of informing us of the basis for their motion and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). Once the defendants meet their initial burden, the plaintiffs may not rest upon their pleadings, but must set forth specific facts showing there is

a genuine issue for trial. See Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324, 106 S.Ct. at 2553.

In support of their motion for summary judgment as to counts one and two, the defendants raise two meritorious arguments: first, that the doctrine of res judicata bars the plaintiffs' claims, and second, that the plaintiffs failed to substantiate their claims factually.

A. Res Judicata

The defendants contend that the plaintiffs are barred by the doctrine of res judicata from bringing this case. They argue that although the plaintiffs pursue legal theories different from those in Page, the claims involve the same basic underlying facts, seek the same basic relief, and are brought by parties sufficiently related to the Page plaintiffs so that they should be treated as the same under the doctrine of virtual representation. In essence, defendants claim that because the matter has been litigated once, the plaintiffs are precluded from doing so again.

Res judicata or claim preclusion operates to prevent a party from raising or defending against a claim that already has been decided. As the Supreme Court recognized in Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906 (1983):

> [T]he doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the

> claim or demand, but as to any other admissible matter which might have been offered for that purpose'. . . . The final 'judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever.'

Id. At 129-30, 103 S.Ct. at 2918 (quoting Cromwell v. County of Sac, 94 U.S. 351, 352 (1876), and Commissioner v. Sunnen, 333 U.S. 591, 597, 68 S.Ct. 715, 719 (1948)). Res judicata requires a showing that there has been "(1) a final judgment on the merits of a prior suit involving (2) the same claim and (3) the same parties or their privities." EEOC v. United States Steel Corp., 921 F.2d 489, 493 (3d Cir. 1990); see Board of Trustees of Trucking Employees Welfare Fund, Inc. v. Centra, 983 F.2d 495, 504 (3d Cir. 1992). If these three factors are present, the court must dismiss a claim that was or could have been raised previously as precluded. See Corestates Bank v. Huls Am., Inc., 176 F.3d 187, 194 (3d Cir. 1999). Inasmuch as the panel in Page has entered a final judgment on the merits of that case, the issue is whether this matter involves the same claim by the same parties.[3]

Turning first to whether this matter involves the same claim as Page, we note that "[i]n deciding whether two suits are based on the same claim 'cause of action,' we

---

[3] The plaintiffs in Page have filed an appeal. That circumstance is not germane to our res judicata analysis as the Page judgment has preclusive effect unless disturbed on the appeal. See Restatement (Second) of Judgments 2d § 13 cmts. b & f Comments (b) and (f) (stating that for res judicata purposes, judgment is "final" even if pending on appeal); id. § 16 cmts. a-c; see also Huron Holding Corp. v. Lincoln Mine Operating Co., 312 U.S. 183, 189, 61 S.Ct. 513, 515 (1941).

take a broad view, looking to whether there is an 'essential similarity of the underlying events giving rise to the various legal claims.'" Id. (quoting United States v. Athlone Indus., 746 F.2d 977, 984 (3d Cir. 1984)). To that end, causes of action are deemed the same if they arise from the same transaction, with the scope of the transaction being determined by considering whether there exists a common nucleus of operative facts. See Restatement (Second) of Judgments § 24 cmt. B (1982); Nevada, 463 U.S. at 130 n.12, 103 S.Ct. at 2918 n.12; Corestates, 176 F.3d at 194.

In considering whether this case and Page involve the same claim, we initially note that the plaintiffs' claims in both cases arise, ultimately, from the same event: approval by the Commission of the new legislative redistricting plan. Further, both complaints center on one specific area of the plan, namely the "unpacking" of Essex County, specifically the former District 27, by moving a substantial portion of the African-American population of that district into a new District 34. Finally, both sets of plaintiffs seek the restoration of voting districts resembling the former District 27 and District 34. Even though the Page plaintiffs challenged the redistricting plan on the grounds that it unconstitutionally diluted the African-American and Hispanic populations' vote, while the current plaintiffs argue essentially the opposite, that is, that the plan constitutes impermissible racial gerrymandering, the difference is of no consequence. This is so because our inquiry focuses not on the specific arguments the plaintiffs set forth in each case, but on the facts and occurrences that underlie and support the plaintiffs' requests for relief. As both causes of action rely upon the same facts and circumstances, we conclude that the final judgment in Page

was entered on the merits in a prior suit involving the same claim as that here.

We therefore turn to the question of whether that final judgment was entered against the same parties or persons in privity with the parties that have brought this case. The term privity "is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include the other within res judicata." United States Steel Corp., 921 F.2d at 493 (internal quotation marks omitted); see First Options of Chicago v. Kaplan, 913 F. Supp. 377, 383 (E.D. Pa. 1996) (internal quotation marks omitted) (noting "[p]rivity is a legal determination for the trial court as to whether the relationship between the parties is sufficiently close to support preclusion"). Courts typically have found that there is privity in three circumstances: (1) where the nonparty has succeeded to, or shares a concurrent right to the party's interest in, property; (2) where the nonparty controlled the prior litigation; and (3) where the party adequately represented the nonparties' interests in the prior proceeding. See, e.g., Latham v. Wells Fargo Bank, N.A., 896 F.2d 979, 983 (5th Cir. 1990).

At issue here is the third category of privity, also known as the doctrine of virtual representation. While the Court of Appeals for the Third Circuit has addressed the doctrine of virtual or adequate representation applying state issue preclusion principles in a diversity case, Collins v. E.I. DuPont de Nemours & Co., 34 F.3d 172, 176 (3d Cir. 1994), as far as we are aware it has yet to set forth the circumstances in which it will find that there has been virtual representation where there has been a previous judgment in an earlier action regarding issues of federal law. In Moldovan v. Great Atlantic & Pacific Tea Co.,

790 F.2d 894, 898-99 (3d Cir. 1986), however, the court set forth general principles of the doctrine. First, the court noted that while "mutuality of estoppel by judgment is no longer considered to be a due process requirement, the development of nonmutual collateral estoppel made no change in the requirement that a party against whom collateral estoppel has been asserted have some fair relationship with the prior litigation relied upon."[4] Id. at 899. Therefore, any privity analysis must center on a finding of identity of interests between the parties in the first and second cases. See id. (emphasis in original) ("It is the identity of interests that determines the due process question, not . . . the identity of issues.").

Other courts to address virtual representation have recognized several guiding principles in determining the applicability of the doctrine. First, identity of interests between the two parties is necessary, although alone it is not sufficient. See Mann v. City of Albany, 883 F.2d 999, 1003 (11th Cir. 1989). Further, courts should consider whether: there is a close relationship between the prior and present parties; the present party participated in the prior litigation; the present party apparently acquiesced; and the present party deliberately maneuvered to avoid the effects of the first action. See Tyus v. Schoemehl, 93 F.3d 449, 455 (8th Cir. 1996) (citing Petit v. City of Chicago, 766 F. Supp. 607, 612 (N.D. Ill. 1991), and 18 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction § 4457 (1981)). Additionally, courts should consider the adequacy of the prior representation, where

---

[4] Moldovan involved collateral estoppel, but its privity analysis is equally applicable here as the concept is common to both preclusion doctrines, collateral estoppel (issue preclusion) and res judicata (claim preclusion).

adequacy is viewed in terms of incentive to litigate. See id.; Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 762 (1st Cir. 1994). As the Tyus court recognized, "one party 'adequately represents' the interests of another when the interests of the two parties are very closely aligned and the first party had a strong incentive to protect the interests of the second party."[5] Tyus, 93 F.3d at 455-56.

Finally, courts should consider whether a public or private law issue is raised. See id. at 456. Where the case raises a public law issue with only an indirect effect on a party's interests, the Supreme Court has recognized that due process concerns are lessened giving courts "wide latitude to establish procedures . . . to limit the number of judicial proceedings. . . ." Richards v. Jefferson County, 517 U.S. 793, 803, 116 S.Ct. 1761, 1768 (1996). Additionally, because of the potentially large number of plaintiffs with standing in public law cases, were they allowed to raise issues continually, public law claims "would assume immortality." Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731, 741 (9th Cir. 1984). Moreover, inasmuch as a plaintiff's success in a public law case may benefit a broad group of persons, claim preclusion predicated on an initial judgment

---

[5] In so finding, the Tyus court dismissed the argument that the adequacy of representation refers not to the incentive to litigate, but rather to trial strategy and possible trial errors. See Tyus, 93 F.3d at 455 n.7. It found that the essence of a virtual representation analysis is the alignment of the parties' interests, therefore "[w]hile incentive to litigate may have some bearing on whether the two parties' interests are aligned, considerations of trial strategy and possible trial errors . . . have little bearing on the relationship between the parties [making them] external to this inquiry." Id. Additionally, the court noted that commonly in civil litigation, clients are held responsible for the acts of their attorney. See id.

may be appropriate because it deters interested individuals from "fence-sitting,"namely waiting for the outcome of the prior action. See Tyus, 93 F.3d at 456. Thus, unless an action is deemed precluded by an earlier judgment, "nonparties would benefit if the plaintiffs were successful but would not be penalized if the plaintiffs lost." Id.

Applying these principles, we find that res judicata based on virtual representation precludes the plaintiffs' claims. To this end, Tyus provides not only a useful virtual representation analysis, but also a factual background remarkably similar to that here. In Tyus a group of St. Louis African-American aldermen had challenged the validity of new ward boundaries drawn as a result of the 1990 census. See id. at 451. The plaintiffs in the action contended that the boundary lines diluted black voting strength in violation of the Voting Rights Act and the First, thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution. See id. At a time when a motion for summary judgment was pending in that suit, several of the same aldermen, along with three other individuals, filed a second lawsuit raising the same legal theories as in the then-pending action. See id. Thereafter, the court granted summary judgment in the first case, see id. at 452, leading the defendants in the second action to move to dismiss the complaint on preclusion grounds. The district court granted the motion, and the court of appeals affirmed.

In applying the virtual representation doctrine, the Tyus court looked first to the relationship between the prior and present parties. The court found it to be close based on the similarity of their claims, and the partial overlap in parties and attorneys. Further, the court deemed it significant that all of the parties shared the same

concern, namely the dilution of the African-American vote in St. Louis, and found that it indicated a particular commonality of interests. See id. at 457. Next, the Tyus court examined the tactical maneuvering that took place, finding that the second plaintiffs' attempt to circumvent trial strategy disagreements flew directly in the face of the policies supporting preclusion. See id. Finally, the court relied upon the fact that the case raised issues of public law, thereby lessening the due process concerns associated with preclusion. See id. Ultimately, given that the factors counseled in favor of preclusion, the court of appeals concluded the first plaintiffs adequately represented the interests of the second plaintiffs and that the two were therefore in privity. See id. at 458.

The facts in this case are strikingly similar to those in Tyus. First, although not as strong, there is an identity of parties between the prior and present plaintiffs. The Page plaintiffs include, among others, Republican members of the New Jersey Senate and General Assembly. See Page, F. Supp. at ___, 2001 WL 505187, at *2 n.3. Here, plaintiff Robertson is a Republican member of the New Jersey Senate. Therefore, although he did not directly participate in the Page litigation, by association he was a party to it. While it is true that the other plaintiffs here were not parties in Page, the situation in Tyus was somewhat similar as there were three plaintiffs in the second case there that had not been parties in the first case. Moreover, there is a clear commonality of interests among all of the parties: their challenge to the validity of the New Jersey redistricting plan. This much is obvious in that a victory by the Page plaintiffs would have directly benefitted the Robertson plaintiffs.

Second, viewing the timing and joinder of additional parties, we find that the Robertson plaintiffs engaged in tactical maneuvering.[6] Like the plaintiffs in Tyus, who brought their action while the the underlying case was pending, the Robertson plaintiffs elected to file a new complaint prior to the disposition of Page, rather than intervening and arguing their position in the alternative as Page plaintiffs. Further, Robertson added new plaintiffs to the second cause of action. As the Tyus court noted, to allow the second lawsuit under these circumstances would "directly contravene[ ] the policies supporting the preclusion doctrines." Tyus, 93 F.3d at 457. Rather than creating an incentive to intervene:

> [H]olding preclusion inapplicable assures that a party would not intervene, for it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefitting the entire group. This entails a significant cost to the judicial system and 'discourage[s] the principles and policies the doctrine of res judicata was designed to promote.'

Id. (quoting Petit, 766 F. Supp. At 613).

Third, the Robertson plaintiffs clearly received adequate representation in Page. As noted previously, the Page plaintiffs had every incentive and opportunity to litigate the validity of New Jersey's redistricting plan fully and experienced competent counsel represented them in

---

[6] We do not imply that their litigation tactics were in any way improper.

that endeavor. While it is true that this case differs from Tyus in that the present plaintiffs raise different, indeed opposite, claims from those made in the first, i.e., Page litigation, the difference is immaterial. The Page plaintiffs sought, and the present plaintiffs seek, a declaration that the redistricting plan is unlawful and relief precluding its implementation. Whether the court invalidated the redistricting plan because it unlawfully diluted the voting strength of African-American voters or because it constituted racial gerrymandering does not matter; the result desired by the plaintiffs in each action would have been accomplished. Therefore, the plaintiffs' different claims amount to nothing more than differences in strategy, clearly an inappropriate basis upon which to allow a second lawsuit.

Fourth and finally, this case raises an issue of public law. The Robertson plaintiffs allege that the redistricting plan constitutes racial gerrymandering; they do not claim they "have a different private right not shared in common with the public." Id. (internal quotations omitted).[7] Therefore, there is a genuine concern that the issue of whether the redistricting plan is valid could "assume immortality." Los Angeles Branch NAACP, 750 F.2d at 741.[8]

---

[7] We recognize that Robertson and Zecker are incumbent legislators but the terms for which they were elected are not impaired by the redistricting which obviously has only a prospective effect. While we are not oblivious to the circumstances that incumbents frequently are reelected, still, from a legal point of view, they have no more claim of right to seats in the next legislature from District 34 than any person eligible to run in that district.

[8] We realize that as a practical matter once the new redistricting plan is implemented and an election is held under it, there is not likely to be a further judicial challenge to the plan and thus the use of the term

Considering all of these factors, and the Court of Appeals for the Third Circuit's broad approach to privity, see Collins, 34 F.3d at 176, we find that while this case is close, the Page plaintiffs adequately represented the interests of the Robertson plaintiffs, and therefore the two sets of plaintiffs are in privity.[9] Accordingly, because there has been a final judgment on the merits in Page in which the plaintiffs challenged the same transaction and the plaintiffs here are in privity with those in Page, we must dismiss any claim that was or could have been raised previously in Page. On this basis we grant the defendants a summary judgment on the first two counts of the complaint.

Notwithstanding our conclusion of this res judicata point, because this case is close and because of the importance of this matter both to the parties and general public, we nevertheless address the merits of the plaintiffs' gerrymandering and discrimination claims.

B. Racial Gerrymandering Claim

The Supreme Court set forth the principles governing a claim of racial gerrymandering in Shaw v. Reno, 509 U.S. 630, 113 S.Ct. 2816 (1993), and recently reaffirmed them in Hunt v. Cromartie, 121 S.Ct. 1452, 1458 (2001). In Shaw, the Court held that "a plaintiff challenging a reapportionment statute under the Equal

---

"immortality" is an overstatement here. Nevertheless, Los Angeles Branch NAACP sets forth a concept useful here.

[9] This conclusion does not apply, however, to the plaintiffs' challenge to the constitutionality of New Jersey's one-year residency requirement as there was no commonality of interests between the two sets of plaintiffs as to this claim. Moreover, Page was not directly concerned with residency requirements.

Protection Clause may state a claim by alleging that the legislation, though race neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." Shaw, 509 U.S. at 649, 113 S.Ct. at 2828. In Hunt, the Court reiterated its previously stated position that the plaintiff "must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'" Hunt, 121 S.Ct. at 1458 (quoting Miller v. Johnson, 515 U.S. 900, 916, 115 S.Ct. 2475, 2488 (1995)). Indeed, the plaintiffs must establish that race was not simply "a motivation for the drawing of a majority-minority district," Bush v. Vera, 517 U.S. 952, 959, 116 S.Ct. 1941, 1952 (1996), but "the 'predominant factor' motivating the legislature's districting decision." Hunt, 121 S.Ct. at 1458 (quoting Hunt v. Cromartie, 526 U.S. 541, 547, 119 S.Ct. 1545, 19549 (1999), and Miller, 515 U.S. at 916, 115 S.Ct. at 2488). Put another way, the plaintiffs bear the burden of establishing that a facially neutral law "is unexplainable on grounds other than race." Id. (internal quotations omitted). Of course, the burden on plaintiffs to make this showing is a "demanding one." Miller, 515 U.S. at 928, 115 S.Ct. at 2497 (O'Connor, J. concurring).

Therefore, under Shaw a plaintiff may challenge a reapportionment statute successfully by showing that a redistricting plan on its face is so dramatically irregular that it only can be explained as an attempt to segregate persons by race for purposes of voting without regard for traditional redistricting principles. See Shaw, 509 U.S. at 649, 113 S.Ct. at 2828. The Court expressly declined to decide, however, under what circumstances a redistricting

plan that, on its face, can be explained in nonracial terms, successfully could be challenged. See id.

One year after Shaw, a three-judge panel in DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994), aff'd, 515 U.S. 1170, 115 S.Ct. 2637 (1995), addressed that issue. In DeWitt, the plaintiffs brought a Shaw-type challenge to California's 1992 redistricting plan, alleging the map drawers' consideration of race pursuant to the Voting Rights Act constituted an unconstitutional racial gerrymander. See id. at 1410-12. The district court granted the defendants' motion for summary judgment, finding that the redistricting plan did not involve racial gerrymandering and therefore did not violate the Fourteenth and Fifteenth Amendments, see 856 F. Supp. At 1410, and the Supreme Court summarily affirmed. See De Witt, 515 U.S. 1170, 115 S. Ct. 2637.

In so holding, the district court considered the "narrow holding" of Shaw, finding a plaintiff only states a claim where the redistricting "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." Id. at 1413. It concluded that the California redistricting plan did not fit within this narrow holding. See id. Specifically, the court found that the msters charged with redrawing the district map "sought to balance the many traditional redistricting principles, including the requirements of the Voting Rights Act." Id. Further, the redistricting plan did not create bizarre boundaries. See id. To the contrary, the court found the redistricting plan emphasized "geographical compactness which takes into account the presence or absence of a sense of community made possible by open lines of access and communication." Id. (internal

quotations omitted). There was also evidence that the masters analyzed and reconciled the traditional districting requirements of population equality, contiguity, geographic integrity, community of interest and the retention of existing political boundaries. See id. at 1414.

In this context, "where race is considered only in applying traditional redistricting principles along with the requirements of the Voting Rights Act," the court concluded strict scrutiny of the plan was not required even though, as Bush made clear, a redistricting scheme will be subject to strict scrutiny if race is the predominant factor in drawing the district lines. See Bush, 517 U.S. at 959, 116 S.Ct. at 1951-52; Page v. Bartels, 248 F.3d at 192; DeWitt, 856 F. Supp. at 1415. Indeed, Shaw recognized that consciousness of race does not give rise to a claim of racial gerrymandering when race is considered along with traditional redistricting principles, such as compactness, contiguity and political boundaries. See Shaw, 509 U.S. at 646, 113 S.Ct. at 2826. The Supreme Court since has affirmed this conclusion expressly. See Bush, 517 U.S. at 958, 116 S.Ct. at 1951 (noting strict scrutiny does not apply merely because redistricting is performed with consciousness of race and citing DeWitt for proposition that strict scrutiny does not "apply to all cases of intentional creation of majority-minority districts").

Here, the plaintiffs contend the Commission engaged in unlawful gerrymandering in drawing the redistricting plan generally, and in redrawing District 34, Senator Robertson's and Assemblyman Zecker's district, specifically. In support of their claim, they rely upon statements made by Bartels, in his certification and at trial in the Page case, as well as what they characterize as "the senseless nature of the combination of towns" in District

34. Pls.' Br. In Supp. of Order to Show Cause at 17. But after analyzing the principles Shaw and DeWitt set forth and which the Court has affirmed in Hunt, we are satisfied that the plaintiffs have failed to support a claim for racial gerrymandering subject to strict scrutiny.[10]

First, the record reveals that rather than drawing district lines solely on the basis of race, the Commission considered traditional redistricting principles as well as the requirements of the Voting Rights Act. The plaintiffs point to two paragraphs in Bartels' certification to support their argument that race was the predominant factor in the Commission's adoption of the redistricting plan. In paragraph 6, Bartels stated that, due to his understanding of the Voting Rights Act, "in the process of evaluating competing redistricting maps, I paid close attention to racial and ethnic data and electoral opportunities." Defs.' Mot. For Summ. J. Ex. D (Bartels Cert. ¶ 6). In paragraph 12, Bartels stated, "I was . . . determined not to adopt any plan that would significantly threaten the reelection chances of incumbent minority legislators, and furthermore, I was determined to examine possibilities for expanding minority representation." Id. ¶ 12. He continued by stating, "I was (and am) convinced that every minority incumbent who seeks reelection in 2001 under

---

[10] In their brief opposing the defendants' motion for summary judgment, the plaintiffs cite King v. State Board of Elections, 979 F. Supp. 619 (N.D.Ill. 1997), presumably to support their position that strict scrutiny applies to the redistricting plan in this case, and that under that standard, the Commission has failed to show a compelling state interest. The King case, however, was on remand from a determination by the Supreme Court that the plaintiffs had stated a racial gerrymander claim, and therefore deals exclusively with the application of the strict scrutiny test. Because we conclude strict scrutiny is inapplicable to this redistricting plan, the plaintiffs' reliance on King is misplaced.

[the plan adopted] has a strong opportunity to be reelected. Moreover, I believe that [the plan] is superior to GOP-H20 (or any other plan proposed by the Republicans) in terms of creating new opportunities for minority candidates to win seats in the Legislature." Id. The plaintiffs point to these statements as evidence that Bartels and the Commission made race the "predominant factor in the odd configuration of the new 34th District." Pls.' Br. in Supp. of Order to Show Cause at 12.

The plaintiffs, however, take these comments out of the larger context of Bartels' full certification and trial testimony. In his certification, Bartels first summarized his approach to evaluating and selecting a redistricting plan. He stated:

> 6. Based on Justice Clifford's[11] advice, I understood that federal law prohibited any redistricting plan that gave minority voters less opportunity than non-minority voters to elect their preferred candidates to the New Jersey Legislature. Therefore, in the process of evaluating competing redistricting maps, I paid close attention to racial and ethnic data and electoral opportunities.
>
> 7. However, those were not my sole considerations. I also paid close attention to several other criteria, including (1) minimizing the population deviations among the districts, as required by the 'one person,

[11] The reference to Justice Clifford was to Robert L. Clifford, a retired New Jersey Supreme Court justice who was advising Bartels as a private attorney, not as a Supreme Court justice.

> one vote' rule; (2) keeping each of the forty districts contiguous; (3) keeping each of the forty districts reasonably compact; (4) respecting municipal boundaries by not splitting any towns other than Newark and Jersey City (which are too large to fit in one legislative district); (5) respecting voting-district boundaries; (6) avoiding any bias in the map that might favor one political party over the other in an election year when the two parties were tightly competitive; (7) ensuring that some seats were competitive so that the composition of the Legislature would be responsive to shifts in votes from one party to the other; and (8) minimizing voter disruption, so as not to deny too many New Jersey citizens the opportunity to vote for incumbents who had served them well or against incumbents who had not done so.

Defs.' Mot. for Summ. J. Ex. D. (Bartels Cert. ¶¶ 6-7). He then went on to examine and elaborate on these criteria. Regarding equal population, he stated:

> Because New Jersey's resident population, according to the 2000 census, was 8,414,350, the ideal population for each of the forty districts was approximately 210,359. For each map I considered, I determined the average . . . deviation . . . and the maximum deviation. . . . The average deviation in [the plan ultimately adopted] is 4,481 and the maximum deviation is 16,495.

> For the Republicans' plan . . ., the average deviation was 5,062 (approximately 13 percent larger than in [the adopted plan]) and the total deviation was 17,879 (approximately 8 percent larger than in [the adopted plan].

Id. ¶ 11. On contiguity, Bartels certified:

> I insisted that all 40 districts be contiguous — that is, that no district be divided into two or more discrete pieces. Contiguity allows candidates and representatives to get from one part of the district to another efficiently, without traversing other districts. At one point, I insisted on putting the town of Pine Beach in District 9 rather than District 10 to avoid a potential problem of contiguity stemming from some legal uncertainty regarding municipal jurisdiction over a portion of the Toms River. In [the plan selected], all 40 districts are contiguous.

Id. ¶ 13. Similarly, Bartels elaborated on his consideration of compactness by stating:

> From the political science literature, I am aware that there are many competing measures of compactness, some of which may conflict with others. The fact that all of the proposed plans maintained the integrity of voting districts and (with the necessary exceptions of Newark and Jersey City)

> municipalities helped to ensure a reasonable level of compactness. However, even with those constraints it would be possible to create rather bizarrely shaped districts. I discouraged both sides from proposing such districts, and in some cases suggested specific changes intended to improve compactness. I believe that the plan adopted by the Commission . . . contains 40 reasonably compact districts.

Id. ¶ 14. Finally, Bartels specified with regard to respecting municipal and voting-district boundaries that "[a]ll of the proposed plans kept every municipality in the State of New Jersey intact within one district, with the necessary exceptions of Newark and Jersey City," and "[a]ll of the proposed plans kept every voting district intact within one legislative district." Id. ¶¶ 15-16.

Bartels also testified as to his reliance upon these criteria during the Page trial. When asked to describe for the court the criteria he applied, he stated:

> Some of the criteria were clear legal criteria having to do, for example, with the maximum allowable population deviation across districts, with issues of contiguity and compactness, with requirements about maintaining intact within a single district municipalities, except in cases where that was impossible to do because of the numbers. The various criteria with respect to minority representation in the Voting Rights Act — all of those were legal hurdles

> that any plan would have to overcome, that were also a variety of criteria that seemed to me to be important in addition to those. Some of them had to [do] with refinements of the same criteria. For example, in situations where the population deviations were within what courts had typically allowed, it still seemed to me to be advisable to have the deviation and population across districts be as small as possible. There were criteria with respect to the partisan . . . bias of a particular plan. With respect to the responsiveness of the district to changes in voting patterns over the course of the coming decade, and an attempt to minimize voter disruption by insuring that as many people as possible would have the opportunity to vote for or against their current incumbents.

Ex. G (Page Trial Tr. At 349-50). Bartels also testified as to precisely why he selected the Democrats' plan over that of the Republicans, stating he found the Republicans' plan to be "inferior" with respect to partisan bias and voter disruption. Id. at 375-78.

In sum, Bartels' certification and trial testimony in Page clearly establish that while race was a consideration in selecting a redistricting plan, it was not the predominant factor. Bartels acknowledges that he considered the racial composition of the new districts, including the electoral opportunities for minority candidates. But he considered many factors other than race. As the Court in Shaw recognized, mere consciousness of race in redistricting is

an insufficient basis on which to trigger strict scrutiny where it is considered along with traditional redistricting principles, such as compactness, contiguity and political boundaries. See Shaw, 509 U.S. at 646, 113 S.Ct. at 2826. Here, there is clear evidence, not reflected by actual facts, that in addition to racial criteria, Bartels considered traditional redistricting principles including equal population, contiguity, compactness, respect for municipal and voting-district boundaries, the avoidance of partisan bias, competitive and responsiveness, and the minimization of voter disruption.[12]

Further, notwithstanding the plaintiffs' argument that the districting plan resulted in the "senseless" combination of towns, the boundaries of the redistricting plan generally, and District 34 specifically, are hardly irregular or bizarre. As to compactness and municipal boundaries, Bartels' certification states that the Commission's plan "contains 40 reasonably compact districts" and "[a]ll of the proposed plans kept every municipality in the State of New Jersey intact within one district, with the necessary exceptions of Newark and Jersey City." Defs.' Mot. for Summ. J. Ex. D (Bartels Cert. ¶¶ 14-15).

---

[12] Indeed, the plaintiffs come close to conceding as much in their brief in support of their order to show cause in which they state that "[a]lthough the plan adopted did not appear to violate the New Jersey constitutional requirements of contiguity, compactness and respect for municipal boundaries, everything else took a back seat to race as a consideration." Pls.' Br. in Supp. of Order to Show Cause at 14. The plaintiffs then proceed to cite instances from Bartels' certification where he discusses such traditional redistricting criteria as equal population, avoiding partisan bias, competitiveness and responsiveness, and minimizing voter disruption. See id.

The plaintiffs nevertheless argue that District 34 is shaped irregularly because three contiguous municipalities, Totowa, West Paterson and Little Falls, that enjoy similar history, demographics, media and institutions, are in three different legislative districts.[13] At the same time, East Orange no longer shares a district with demographically-similar Orange, West Orange and South Orange, but rather is part of a district including towns of a different racial, demographic, social and economic composition.

The plaintiffs argue, in essence, that race was the predominant reason for the inclusion of predominantly African-American East Orange into the heretofore predominantly white District 34. But, as noted previously, while Bartels expressly considered race in selecting a redistricting map, specifically the opportunities for minorities to be elected to office, he also relied upon traditional redistricting principles. Bartels considered and adhered with respect to District 34 to principles of contiguity, compactness, respect for municipal boundaries and partisan fairness and responsiveness. Therefore, we find the redistricting plan is not of such a bizarre or irregular shape that it is unexplainable on grounds other than race.

Finally, the plaintiffs challenge the plan on the theory that, rather than "packing" African-American voters into majority-minority districts, it attempts to integrate several legislative districts, principally District 34. Therefore, while race was still a factor in drawing the

---

[13] It is worth nothing, however, that these three municipalities were not in the same district under the previous redistricting plan. To the contrary, Totowa and Little Falls were in District 34, while West Paterson was in District 35. See Defs. Mot. for Summ. J. Ex F (Manual of the Legislature of New Jersey, at 950-52).

redistricting plan, the import of the considerations underlying the Court's decisions in Shaw and Hunt is diminished. As the Shaw Court found:

> [R]eapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group — regardless of their age, education, economic status, or the community in which they live — think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.
>
> ***
>
> [Further,] [t]he message that such districting sends to elected representatives is equally pernicious. When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.

Shaw, 509 U.S. at 647-48, 113 S.Ct. at 2827. These concerns, while unquestionably legitimate, do not come into play under the Commission's plan. Indeed, the redistricting plan goes farther than traditional majority-minority redistricting plans in fighting these concerns by purposefully retaining geographically contiguous and compact boundaries at the expense of a majority-minority racial composition.

Therefore, we find that the record demonstrates that a trier of fact would be constrained to conclude that the redistricting plan carefully was drawn utilizing traditional redistricting principles while seeking to comply with the Voting Rights Act by giving minority candidates the opportunity to be elected to political office. While the Commission certainly considered race in selecting the plan, its use was permissible and was not the predominant factor in the adoption of the redistricting plan. Accordingly, the plaintiffs have failed to substantiate a claim of racial gerrymandering in violation of the Equal Protection Clause or the Fifteenth Amendment and the defendants' motion for summary judgment is granted as to Count I.

C. Disparate Treatment Claim

Count II of the plaintiffs' complaint alleges that the redistricting plan unconstitutionally separates incumbents by their race and subjects them to disparate treatment on that basis. Although not expressly stated as such, this argument presents a variation on their first argument, namely that race — of incumbents, rather than voters — was the predominant factor in the Commission's decision to adopt the redistricting plan. Because we find that race, while considered, was not the predominant factor in the Commission's redistricting plan, we also grant the defendants' motion as to Count II.

In support of their position, the plaintiffs again point to statements in Bartels' certification that he considered the reelection prospects of minority incumbent legislators in evaluating the plans. See Defs.' Mot. for Summ. J. Ex. D (Bartels Cert. ¶¶ 6, 12, 22). But, as previously discussed, Bartels considered much more than simply the reelection chances of minority incumbents in assessing the redistricting plans. Indeed, Bartels expressly stated that he considered "minimizing voter disruption, so as not to deny too many New Jersey citizens the opportunity to vote for incumbents who had served them well or against incumbents who had not done so." Id. ¶ 7. Bartels conceded that this goal conflicted to a certain degree with "the goals of creating a fair, unbiased, and responsive map and building new opportunities for minority representation," but that the plan was a good compromise. Id. ¶ 21. Furthermore, Bartels sought to achieve statewide partisan fairness so that the party that receives a majority of the total statewide vote in a

legislative election will obtain a majority in the legislature. See id. ¶¶ 17-18.

It was central to achieving Bartels' goals in the redistricting to "unpack" the primarily African-American districts in Essex County, a process which necessarily made the surrounding districts, including District 34, more racially integrated. Of course, one consequence of the unpacking was that the chances for the reelection of the incumbents in those previously predominantly white districts was lessened, but this circumstance does not mean that the race of the incumbent was the predominant factor of the Commission's consideration. In redistricting, the Voting Rights Act makes race a relevant factor to be considered, and strict scrutiny is not triggered necessarily where it is utilized. To the contrary, the Voting Rights Act expressly directs redistricts and courts to consider "[t]he extent to which members of a protected class have been elected to office" when analyzing the "totality of circumstances" confronting minority voters and, as we have indicated, the Supreme Court has found race to be a constitutionally appropriate factor, so long as it is not the predominant factor. 42 U.S.C. § 1973(b). It is therefore apparent that while Bartels and the Commission considered the race of incumbents in assessing the proposed redistricting maps, race was not the predominant factor in their decision to adopt the present plan. Accordingly, we grant summary judgment in favor of the defendants on Count II.

D. Constitutionality of Residency Requirement

The third count of the complaint challenges the one-year district residency requirement of Article IV, § I, ¶ 2, of the New Jersey Constitution which provides:

> No person shall be a member of the Senate who shall not have attained the age of thirty years, and have been a citizen and resident of the State for four years, and of the district for which he shall be elected one year, next before his election. No person shall be a member of the General Assembly who shall not have attained the age of twenty-one years and have been a citizen and resident of the State for two years, and of the district for which he shall be elected one year next before his election. No person shall be eligible for membership in the Legislature unless he be entitled to the right of suffrage.

This count relates to the plaintiffs, Dennis E. Gonzalez and Jay R. Schwartz, both of whom wish to run for the General Assembly on November 6, 2001.[14]

Gonzalez explains his residency situation as follows. In January 2001, he moved from Paterson to Clifton. Under the legislative districting in effect at that time, i.e., the districting over the last decade, this move meant that he would not have been eligible for election to the General Assembly in 2001, as Paterson was in District

---

[14] Plaintiffs Robertson and Zecker are incumbent legislators in District 34 but they do not assert that the New Jersey residency requirements preclude them from running for reelection.

35 and Clifton was in District 34. Inasmuch as Paterson and Clifton remain in District 35 and 34, respectively, adoption of the new redistricting plan does not change his residency problem.

While Schwartz's situation is slightly different from Gonzalez's, in the final analysis it is the same. Schwartz explains that in March 2001 he moved from West Paterson to Little Falls. Under the legislative districting in effect at that time, i.e., over the last decade, this move meant that he would not have been eligible for election to the General Assembly in 2001, as West Paterson was in District 35 and Little Falls was in District 34. The redistricting, however, has moved West Paterson to District 34 and Little Falls to District 40 and thus Schwartz is not eligible for election to the General Assembly in 2001. The redistricting, however, did not make him ineligible to run. It merely did not cure the problem he caused for himself by moving as the redistricting might have done if it had placed West Paterson and Little Falls in the same district.

Significantly, both Gonzalez and Schwartz moved before April 11, 2001, the day that the Apportionment Commission certified the new districts. Thus, they should have recognized that they were certain to become ineligible to run for the General Assembly unless the Commission placed their old and new residences in the same district.

We have set forth the residential background of Gonzalez and Schwartz to demonstrate the lack of relationship of their claim based on their ineligibility to run for the General Assembly to the redistricting claims the plaintiffs advance in the first two counts of the complaint. We have been convened as a three-judge district court under 28 U.S.C. § 2284 which provides for such a court

when "an action is filed challenging the constitutionality of the apportionment . . . of any statewide legislative body. . . ." In this case, it is clear beyond doubt that the first two counts of the complaint are within section 2284, but the third count standing alone is not.

The question, then, is whether a properly convened three-judge court can, and if so should, exercise jurisdiction over all aspects of a case including those that otherwise a single judge would entertain. In Morse v. Oliver North for U.S. Senate Committee, Inc., 853 F. Supp. 212, 215 (W.D. Va. 1994), rev'd on other grounds, 517 U.S. 186, 116 S. Ct. 1186 (1996), the three-judge district court dealing with this issue explained as follows:

> We are aware that some three-judge district courts have taken the view that when a three-judge court has been properly convened for some claims in which such a court is required it may, in its discretion, exercise jurisdiction over other claims for which a three-judge court is not required. See, e.g. Armour v. Ohio, 775 F. Supp. 1044, 1048 (N.D. Ohio 1991); Tucker v. Montgomery Bd. Of Comm'rs, 410 F. Supp. 494, 500 (M.D. Ala. 1976). However, the only district court decision in that circuit to address the question holds to the contrary and is the more persuasive, we think. We thus follow the three-judge panel of the United States District Court for the District of south Carolina which held, 'Any rights asserted by the plaintiffs under other federal statutes or Constitutional provisions can be

> asserted only before the [single-judge] District Court.' Gordon v. Executive Comm. of the Democratic Party of Charleston, 335 F. Supp. 166, 170 (D.S.C. 1971) (per curiam). We think the view of that court is consistent with the intent of Congress to limit the jurisdiction of three-judge courts, which resulted in the 1976 legislation repealing 28 U.S.C. §§ 2281 & 2282 and amending 28 U.S.C. § 2284. See Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 (1976); [Charles A. Wright, the Law of Federal Courts § 50, at 296-97 (4th ed. 1983)]; see also Perez v. Ledesma, 401 U.S. 82, 87, 91 S.Ct. 674, 678, 27 L.Ed.2d 701 (1971) ('Even where a three-judge court is properly convened to consider one controversy between two parties, the parties are not necessarily entitled to a three-judge court and a direct appeal on other controversies that may exist between them.' (footnote omitted)).

In Page v. Bartels, 248 F.3d 175, the court of appeals dealt with the similar but yet different question under section 2284 of whether a three-judge court should entertain a Voting Rights Act challenge to a statewide redistricting plan when the plaintiffs also make a constitutional challenge to the plan. After noting that section 2284(a) provides for a three-judge court when the "constitutionality of" the apportionment is challenged the court of appeals indicated that:

> We conclude that because statutory Voting Rights Act challenges to statewide legislative apportionment are generally inextricably intertwined with constitutional challenges to such apportionment, those claims should be considered a single 'action' within the meaning of § 2284(a). Thus, when a single district judge is presented with both types of claims, he or she may not resolve the Voting Rights Act issues in isolation while reserving the constitutional claims to a three-judge district court; rather, the single district judge should adhere to the limitations on his authority imposed by § 2284(b)(3).

Id. at 190 (emphasis added).

If the standard for us to follow is that we should entertain the residency challenge only if we find it "inextricably intertwined" with the constitutional challenges, then surely the residency issues would not be appropriate for three-judge resolution, as plaintiffs' redistricting and residency challenges are distinct. We are in a different position from that of the court of appeals in Page, however, as we have no need to make a definitive ruling on whether the nonconstitutional issues must be resolved by a single judge because we are satisfied from the authorities the district court cited in Morse that even if we could hear the residency requirement issue, we have the discretion not to do so. We think that it is plain that the redistricting and residency issues are so distinct that the sound exercise of discretion should lead us to refer the voting rights issue to a single judge for disposition. Thus,

we do exactly that and as a three-judge court will not adjudicate the residency issue.

## IV. CONCLUSION

For the foregoing reasons, we grant the defendants' motion for summary judgment on Counts One and Two of the complaint and refer Count Three to a single judge for disposition.

**/s/ Morton I. Greenberg**

MORTON I. GREENBERG
UNITED STATES CIRCUIT JUDGE

FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

No. 01-2024

---

NORMAN M. ROBERTSON, JOHN COIRO, EUGENE KULICK, GARRY COLLETTI, JAY R. SCHWARTZ, DENNIS E. GONZALEZ, GERALD H. ZECKER

Plaintiffs

v.

LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacities as members of the State of New Jersey Apportionment Commission, the STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DEFOREST B. SOARIES, JR., Secretary of State of the State of New Jersey, and JOHN FARMER, Attorney General of the State of New Jersey,

Defendants.

---

Argued May 31, 2001

FILED
June 26, 2001
At 8:30 a.m.
William T. Walsh, Clerk

ENTERED
On 6-28-01
By "A.R."

BEFORE: MORTON I. GREENBERG, Circuit Judge,
and
DICKINSON R. DEBEVOISE and HAROLD A.
ACKERMAN, District Judges

---

**ORDER**

---

It is hereby ordered that the word "reflected" in the third line from the bottom on page 28 in the typescript copy of the opinion filed June 18, 2001, in this matter is deleted and the word "refuted" is substituted for it.

**/s/ Morton I. Greenberg**

MORTON I. GREENBERG
UNITED STATES CIRCUIT JUDGE

SOKOL, BEHOT & FIORENZO
Continental Plaza
433 Hackensack Avenue
Hackensack, New Jersey 07601
Leon J. Sokol (LJS 4101)
(201) 488-1300
Attorneys for Defendants STATE OF NEW JERSEY APPORTIONMENT COMMISSION, CODEY, DELGADO, GIBLIN, GREENWALD, WATSON COLEMAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

No. 01-2024

---

NORMAN M. ROBERTSON, JOHN COIRO, EUGENE KULICK, GARRY COLLETTI, JAY R. SCHWARTZ, DENNIS E. GONZALEZ, GERALD H. ZECKER

Plaintiffs

v.

LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacities as members of the State of New Jersey Apportionment Commission, the STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DEFOREST B. SOARIES, JR., Secretary of State of the

State of New Jersey, and JOHN FARMER, Attorney General of the State of New Jersey,

Defendants.

---

**ORDER GRANTING SUMMARY JUDGMENT**

---

FILED
June 13, 2001
At 8:30 a.m.
William T. Walsh, Clerk

ENTERED
On 6-14-01
By "A.R."

THIS MATTER having been brought before the Court on Motion by the undersigned attorneys for Defendants State of new Jersey Apportionment Commission, Codey, Delgado, Giblin, Greenwald, and Watson Coleman, the Court having considered the moving papers, papers filed in opposition, if any, arguments of counsel, if any, and for good cause shown;

IT IS on this _____ day of _____, 2001 ORDERED as follows:

1. Plaintiff's application for a preliminary and permanent injunction arising from Counts One and Two of Plaintiff's Complaint is hereby denied;

2. Summary judgment shall be entered in favor of Defendants and against Plaintiffs as to Counts One and Two of Plaintiff's Complaint; and

~~3. A copy of the within Order shall be served upon counsel for Plaintiffs within _____ days of Defendants' counsel's receipt of same.~~

*3. Count Three of the complaint shall be referred to a single judge for disposition.*

**/s/ Morton I. Greenberg**

MORTON I. GREENBERG
UNITED STATES CIRCUIT JUDGE

____ Opposed

____ Unopposed

**NORMAN M. ROBERTSON**
Suite 102B
Overlook at Great Notch
150 Clove Road
Little Falls, NJ 07424
(201) 709-1390
**Appearing Pro Se**

**JAMES A. ROBERTSON**
Kalison, McBride, Jackson
& Murphy, P.A.
645 Martinsville Road
Liberty Corner, NJ 07938
(908) 647-4600
**Attorneys for Appellants**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 01-2024

NORMAN M. ROBERTSON, JOHN COIRO, EUGENE KULICK, GARRY COLLETTI, JAY R. SCHWARTZ, DENNIS E. GONZALEZ, GERALD H. ZECKER

Plaintiffs

v.

LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacities as members of the State of New Jersey Apportionment Commission, the STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DEFOREST B. SOARIES, JR., Secretary of State of the State of New Jersey, and JOHN FARMER, Attorney General of the State of New Jersey,

Defendants.

**NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES**

ORIGINAL FILED
July 26, 2001
William T. Walsh, Clerk

TO: Leon J. Sokol, Esq..
SOKOL, BEHOT & FIORENZO
Continental Plaza
433 Hackensack Avenue
Hackensack, New Jersey 07601

Robert L. Clifford, Esq.
Mc ELROY, DEUTSCH & MULVANEY
1300 Mt. Kemble Avenue
Box 2075
Morristown, New Jersey 07962

Robert E. Levy, Esq.
Scarinci & Hollenbeck, LLC
500 Plaza Drive, P.O. Box 3189
Secaucus, New Jersey 07096

Donna Kelly, D.A.G.
Dept. of Law and Public Safety
Division of law
Richard J. Hughes Justice Complex
Trenton, New Jersey 08625

Paul M. Smith, Esq.
Jenner & Block
601 13th Street N.W.
Washington, D.C. 20005

COUNSEL:

PLEASE TAKE NOTICE that the Plaintiffs in the foregoing action hereby appeal to the Supreme Court of the United States, pursuant to 28 U.S.C. sec. 1253 and 28 U.S.C., sec. 2101 (b), from the final order and judgment entered with respect to Counts One and Two of the Complaint, originally entered on June 13, 2001 pursuant to an Opinion of the Court dated June 18, 2001 and a final corrective Order entered June 26, 2001 by the three-Judge Statutory District Court, lawfully convened pursuant to 28 U.S.C. Sec. 2284, in the United States District Court for the District of New Jersey, the Honorable Morton Greenberg, U.S.C.J., presiding, denying the preliminary and permanent injunctions sought by Plaintiffs and entering final summary judgment in favor of the Defendants.

**/s/ Norman M. Robertson**

---

NORMAN M. ROBERTSON
Appearing Pro Se

KALISON, McBRIDE, JACKSON &
MURPHY, P.A.

**/s/ James A. Robertson**

By_____
JAMES A. ROBERTSON
A Member of the Firm

Dated: July 24, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DONALD PAGE, GERTRUDE WATERS, HAROLD EDWARDS, KATHY EDWARDS, WILLIAM COSTLY, CAROL G. SCANTLEBURY, JOSE A. CABEZA, VICTOR CABEZA, ANTONIO J. ALMEIDA, MARIO H. NENO, DAVID VARGAS, ELVI VASQUEZ, JOSEPH ARTEAGA, FRED SHAW, AARON COLLINS, CHARLES ROBINSON, ALLEN BARNHARDT, THE STATE SENATGE REPUBLICAN MAJORITY, ASSEMBLY REPUBLICAN MAJORITY,

Plaintiffs,

v.

LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LOUIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacity as Members of the State of New Jersey Apportionment Commission, STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DE4FOREST B. SOARIES, JR., Secretary of State of the State of New Jersey, JOHN FARMER, Attorney General of the State of New Jersey,

Defendants.

Civil Action No. 01-1733

---

## CERTIFICATION OF PROFESSOR LARRY M. BARTELS

---

1. I, Larry M. Bartels, am currently a professor of politics and public affairs and the Donald E. Stokes Professor of Public and International Affairs at Princeton University. I teach courses on Party Politics, Public Opinion and Voting Behavior, Mass Media and Public Policy, Research Methods, and Quantitative Analysis, among other topics. I am the founding director of the Center for the Study of Democratic Politics in the Woodrow Wilson School of Public and International Affairs, past president of the Methods Section of the American Political Science Association, and former chair of the Board of Overseers of the National Election Studies. In 1997-8 I chaired a national Task Force on Campaign Reform; the Task Force's report and related materials were published in a volume entitled *Campaign Reform: Insights and Evidence* (University of Michigan Press, 2000) which I co-edited. My book entitled *Presidential Primaries and the Dynamics of Public Choice* (Princeton University Press, 1988) received the American Political Science Association's Woodrow Wilson Foundation Award for the best book published in the United States during 1988 on government, politics, or international affairs. I have been awarded fellowships from the National Science Foundation, the Center for Advanced Study in the Behavioral Sciences, the John Simon Guggenheim Foundation, and the Social Science Research Council. I

was elected to the American Academy of Arts and Sciences in 1995.

2. I am neither registered to vote nor affiliated with any political party.

3. On March 27, 2001, the Chief Justice of the Supreme Court of New Jersey appointed me as the Eleventh Member of the New Jersey Apportionment Commission.

4. In my capacity as the Eleventh Member of the Commission, and with the aid of my staff, I evaluated, critiqued, and attempted to modify redistricting plans presented to me by Republican and Democratic Commission members and their respective staffs. In so doing, I hoped to arrive at a plan that might ultimately be adopted unanimously by the eleven members of the Commission, but my overriding goal was the final adoption of a plan that would give all New Jersey residents the benefits of equal and fair representation in their state legislature.

5. Although, as discussed below, I weighed many criteria when evaluating various redistricting plans, my foremost concern was, of course, that the plan comply with all relevant federal and state laws. To ensure such compliance, I asked former New Jersey Supreme Court Justice Robert Clifford to serve as my counsel and to advise me on all legal matters, including how best to comply with the Federal Constitution and the Voting Rights Act.

6. Based on Justice Clifford's advice, I understood that federal law prohibited any redistricting plan that gave

minority voters less opportunity than non-minority voters to elect their preferred candidates to the New Jersey Legislature. Therefore, in the process of evaluating competing redistricting maps, I paid close attention to racial and ethnic data and electoral opportunities.

7. However, those were not my sole considerations. I also paid close attention to several other criteria, including (1) minimizing the population deviations among the districts, as required by the "one person, one vote" rule; (2) keeping each of the forty districts contiguous; (3) keeping each of the forty districts reasonably compact; (4) respecting municipal boundaries by not splitting any towns other than Newark and Jersey City (which are too large to fit in one legislative district); (5) respecting voting-district boundaries; (6) avoiding any bias in the map that might favor one political party over the other in an election year when the two parties were tightly competitive; (7) ensuring that some seats were competitive so that the composition of the Legislature would be responsive to shifts in votes from one party to the other; and (8) minimizing voter disruption, so as not to deny too many New Jersey citizens the opportunity to vote for incumbents who had served them well or against incumbents who had not done so.

8. I met separately with a delegation of Democratic Commission staff members on Thursday, March 29, 2001, and with some of the Republican Commissioners and members of their staff on Friday, March 30, 2001, to discuss procedures and standards for the Commission's work. The first meeting of the eleven-member Commission occurred on Monday, April 2, 2001. From Monday, April 2, to Wednesday, April 11, my staff and I met repeatedly with the Democratic and Republican Commissioners and their respective staffs and considered

approximately a dozen different plans, maps, or district configurations proposed by Commission members, as well as numerous possible modifications of those proposals. We evaluated every submission using several criteria, as detailed below. I urged one or both sides to work to improve the most significant failings of each map with respect to those criteria. On Wednesday, April 11, 2001, I determined that the plan most recently put forward by the five Democratic members of the Commission fully complied with all legal requirements and judiciously balanced the various values at stake in the redistricting process. It was not only the best plan I had seen in our ten days of deliberations, but also a highly satisfactory plan in absolute terms. While inherent tensions among our various criteria precluded the development of a map that satisfied each individual criterion to the fullest extent, the final proposal put forward by the five Democratic Commission members seemed (and seems) to me to reflect the best attainable balance of all the relevant criteria. I therefore voted to adopt that plan, now known as NJ2001.

9. I would like first to describe the criteria I applied in determining that NJ2001 was the best available plan and then to clarify some possible misconceptions about the process that led to its adoption. For purposes of comparison I will refer to the Republican proposal GOP-H20 submitted on April 10, 2001, since that seems to be the alternative plan referred to in the papers that the Plaintiffs filed in the Federal District Court on Thursday, April 12, 2001. However, it is worth noting that I also evaluated subsequent Republican proposals labeled GOP-H20BX, GOP-H20RX and GOP-H20EPM which differed from GOP-H20 in significant respects.

10. As I have already stated, the foremost criteria were mandated by law: equal population and fair representation for minority voters.

11. **Equal Population.** Because New Jersey's resident population, according to the 2000 census, was 8,414,350, the ideal population for each of the forty districts was approximately 210,359. For each map I considered, I determined the average (root mean squared) deviation (a measure of the average amount by which the districts' populations diverged from the ideal) and the maximum deviation (the difference between the most and least populated districts statewide) The average deviation in NJ2001 is 4,481 and the maximum deviation is 16,495. For the Republicans' plan GOP-H20, the average deviation was 5,062 (approximately 13 percent larger than in NJ2001) and the total deviation was 17,879 (approximately 8 percent larger than in NJ2001).

12. **Minority Representation under the Voting Rights Act and the Federal Constitution.** African-Americans, Hispanics, and other racial and ethnic minority groups protected by the Voting Rights Act and the Federal Constitution are not currently represented in the New Jersey Legislature in proportion to their statewide population. I was therefore determined not to adopt any plan that would significantly threaten the reelection chances of incumbent minority legislators, and furthermore I was determined to examine possibilities for expanding minority representation. In evaluating whether particular plans achieved these goals, I looked very carefully at demographic factors, including the separate and combined percentages of non-Hispanic African-Americans and Hispanics in each proposed district. I also weighed (1) testimony presented to the Commission at five public

hearings in various parts of the state, (2) discussions between Justice Clifford and three allegedly endangered incumbent minority legislators, as reported to me by Justice Clifford, (3) information provided by my ten fellow Commissioners regarding local circumstances that might affect opportunities for minority representation, and (4) my own analysis of racially polarized voting in the 1994 general election for Essex County Executive involving Cardell Cooper and Jim Treffinger – a race cited by Mr. Walter Fields on behalf of the Republican Commissioners as evidence that minority candidates could not be elected in districts of the sort proposed by the Democratic Commissioners. Taking all this evidence into account, I was (and am) convinced that every minority incumbent who seeks reelection in 2001 under NJ2001 has a strong opportunity to be reelected. Moreover, I believe that NJ2001 is superior to GOP-H20 (or any other plan proposed by the Republicans) in terms of creating *new* opportunities for minority candidates to win seats in the Legislature.

13. **Contiguity.** I insisted that all 40 districts be contiguous – that is, that no district be divided into two or more discrete pieces. Contiguity allows candidates and representatives to get from one part of the district to another efficiently, without traversing other districts. At one point I insisted on putting the town of Pine Beach in District 9 rather than District 10 to avoid a potential problem of contiguity stemming from some legal uncertainty regarding municipal jurisdiction over a portion of the Toms River. In NJ2001, all 40 districts are contiguous.

14. **Compactness.** From the political science literature, I am aware that there are many competing

measures of compactness, some of which may conflict with others. The fact that all of the proposed plans maintained the integrity of voting districts and (with the necessary exceptions of Newark and Jersey City) municipalities helped to ensure a reasonable level of compactness. However, even with those constraints it would be possible to create rather bizarrely shaped districts. I discouraged both sides from proposing such districts, and in some cases suggested specific changes intended to improve compactness. I believe that the plan adopted by the Commission, NJ2001, contains 40 reasonably compact districts.

15. **Respecting Municipal Boundaries.** All of the proposed plans kept every municipality in the State of New Jersey intact within one district, with the necessary exceptions of Newark and Jersey City.

16. **Respecting Voting-District Boundaries**. All of the proposed plans kept every voting district intact within one legislative district.

17. **Avoiding Partisan Bias.** One of my primary concerns was that the plan eventually adopted be a fair plan in the sense that the configuration of districts would give neither political party an inherent advantage. The basic idea underlying my analysis of partisan balance is that if candidates for the two major parties receive the same number of votes statewide, an unbiased map should produce an even allocation of seats in the State Legislature. To determine the partisan balance of any given configuration of districts I used results from a variety of recent elections to simulate the expected outcome of an election in which statewide voter support was evenly divided between the two parties. (Because none of these

recent elections actually produced a statewide "tie," the observed results had to be normalized to reflect a 50-50 election.) In accordance with the precedent established by my predecessor as Eleventh Member, Dean Donald E. Stokes, I relied primarily on election results from recent state legislative contests, including 1999 and 1997 General Assembly contests and 1997 State Senate contests. For each race, I totaled the votes for candidates of each party within each proposed district and compared this simulated result to the statewide average vote for candidates of that party. If the simulated Republican vote in a proposed district exceeded the statewide Republican average, that district was projected to be carried by the Republicans in a 50-50 statewide race; if the simulated Democratic vote exceeded the Democratic statewide average, the district was projected to be carried by the Democrats. In addition to this primary analysis, I considered a variety of adjustments suggested by Dean Stokes (for differential turnout), by my staff (for uncontested elections), or by Republican Commissioners (for the effects of incumbency).

18. For the plan adopted by the Commission, NJ2001, my projections suggested that a 50-50 statewide vote would result in Democrats carrying 19 or 20 of the 40 legislative districts (19 using the results from 1997 State Senate elections, 20 using the results from 1997 or 1999 State Assembly elections). The corresponding projections based on the Republicans' plan GOP-H20 suggested that a statewide tie vote would result in Republicans carrying 20 or 21 of the 40 legislative districts (21 using the results from 1997 State Senate elections, 20 using the results from 1997 or 1999 Assembly elections). By these calculations, both plans seemed approximately unbiased, with a slight advantage for NJ2001 (since the modest bias that appears

in NJ2001 seems to work *against* the party that supported the plan). Taking into account the various proposed adjustments for uncontested races, incumbency, and differential turnout usually (but not always) produced clearer differences between the two plans, generally to the advantage of the plan eventually adopted by the Commission.

19. **Competitiveness and Responsiveness.** My concerns with respect to competitiveness and responsiveness were twofold. First, it seemed desirable, other things being equal, for any plan to produce a significant number of competitive districts, so that significant shifts in voters' preferences would be likely to produce significant changes in the composition of the legislature, I evaluated the competitiveness of each of the plans submitted to me by counting the number of cases in which a district seemed likely to be competitive (with an expected margin of less than 10 percentage points) or potentially competitive (with an expected margin of 10 to 20 percentage points) in the case of a close statewide race. Second, it seemed desirable for the partisan balance of competitive districts to be approximately even, so that electoral shifts in either direction would be likely to produce changes of similar magnitude in the composition of the legislature (For example, if a shift in the statewide Democratic vote from 50 to 55 percent produced 10 additional Democratic seats in the Senate and Assembly, then a similar shift in the statewide Republican vote should produce 10 additional Republican seats.) Again, I analyzed data from the 1997 Senate 1997 Assembly, and 1999 Assembly races.

20. By these criteria, the plan adopted by the Commission, NJ2001 produced a total of 20 competitive

races (with an expected margin of less than 10 percentage points) and a further 24 potentially competitive races (with an expected margin of 10 to 20 percentage points) across the three relevant elections. By comparison, the Republican plan GOP-H20 produced a total of 19 competitive races and a further 28 potentially competitive races. In each plan the partisan balance of competitive races was approximately even. Under NJ2001 a 55 percent statewide Republican vote would be expected to produce a total of 69 Republican seats, while a 55 percent statewide Democratic vote would be expected to produce a total of 71 Democratic seats (thus, a potential net Democratic advantage of 2 seats). Under the Republican plan GOP-H20 a 55 percent statewide Republican vote would be expected to produce a total of 71 Republican seats, while a 55 percent statewide Democratic vote would be expected to produce a total of 68 Democratic seats (thus, a potential net Republican advantage of 3 seats). Adjustments for incumbency (or for incumbency plus turnout differentials) significantly increased the number of projected competitive races under both plans, but did not clearly favor either plan over the other with respect to competitiveness or responsiveness.

21. **Minimizing Voter Disruption.** I asked the Commissioners on both sides to attempt to minimize voter disruption. It seemed desirable to me that as many New Jerseyans as possible be able to maintain – or choose not to maintain – their existing relationships with incumbent legislators. This goal conflicted, to some degree, with the goals of creating a fair, unbiased, and responsive map and building new opportunities for minority representation. I believe that the plan approved by the commission does a good job of minimizing voter disruption while satisfying other criteria. In the Republicans' plan GOP-H20,

approximately 58 percent of all New Jerseyans would have remained in the same district as their three current state legislators (one Senator and two Assembly members). The corresponding figure for NJ2001 is approximately 66 percent which implies a reduction in disruption for more than half a million citizens.

22. I considered the incumbency of current members of the Legislature to be relevant with respect to minority representation, partisan balance, and minimizing voter disruption. The plan adopted by the commission, NJ2001, produces one forced primary and a handful of other difficult reelection contests, but does not seem to me to pose any significant threats to minority representation or to impose excessive costs with respect to partisan balance or voter disruption.

23. **Procedures.** Finally, because some of the statements in the papers filed by the Plaintiffs in the Federal District Court on Thursday, April 12, 2001, seem to me to be either false or potentially misleading, I wish to set the record straight regarding several matters of procedure.

24. First, it is simply incorrect to suggest that I withheld from any of the Commissioners the list of criteria that I used to evaluate alternative proposals. Over the course of our ten days of deliberation I engaged in many hours of discussion with Commissioners from both sides (and their staffs) in which I elaborated the relevant criteria and applied them to the various plans proposed by both sides. I did tell the Republican Commissioners, in response to their request for a written statement of the weights I attached to each criteria, that I considered it impossible to provide any precise mathematical formula

for balancing the various complex values at stake in the redistricting process. However, I certainly did not deny them any information provided to Democratic Commissioners or their staff (or anyone else) regarding my thinking about the relevant criteria or their relative importance.

25. Second, it is simply incorrect to suggest that I provided no "meaningful feedback on a Republican plan" before Sunday, April 8. Over the preceding six days I had evaluated and discussed with the Republican Commissioners and their staff all of the previous Republican proposals (designated GOP05, GOP06A, GOP06B, GOP07 and GOP08).

26. Third, I did not "recommend" that the Republican delegation "eliminate the second Hispanic majority district and one Black majority district from the Republican plan" GOP-H20. My staff and I did provide (to both parties) a possible reconfiguration of some of the districts proposed in GOP-H20 (20, 21, 22, 27, 28, 29, 31, 32, 34 and 36) with the aim of solving some of the problems of compactness, voter disruption, and population deviation event in that plan. We did so with the explicit caution that the result might not represent an improvement over GOP-H20. Our own subsequent evaluation suggested that the result was significantly inferior to GOP-H20 with respect to partisan balance and perhaps also with respect to minority representation. That assessment weighed heavily in my conclusion that any plan within the general framework favored by the Republicans would be unlikely to improve upon the plan eventually adopted as NJ2001.

27. Fourth, partisan "fairness" was not the "primary factor" in my decision-making process. Compliance with

all applicable laws – including, of course, the Voting Rights Act and the Federal Constitution – was my primary consideration. I emphasized repeatedly to both sides that I would not support any plan that did not satisfy all relevant legal requirements, whatever other virtues it might have.

28. Fifth, while I did suggest that I would be willing to consider a plan that reduced the number of majority-minority districts proposed by the Republicans, I never suggested that I would be willing to reduce minority citizens' opportunities to elect their preferred candidates to the New Jersey Legislature in order to achieve partisan fairness or any other goal.

29. Sixth, the suggestion that Justice Clifford accepted additional legal memoranda from the Democrats while denying the Republicans an opportunity to make their case is false; both sides received exactly the same opportunities to provide legal arguments and case material.

28. Seventh, the claim that plan NJ2001 was "virtually identical, with only minor changes to the first plan submitted by the Democrats" seems to me to be quite inaccurate. While the distinction between "major" and "minor" changes is obviously in the eye of the beholder, the sequence of plans proposed by the Democrats reflected a variety of significant concessions in response to criticisms and suggestions from me and my staff, and from the Republicans.

29. Eighth, and finally, I do not believe that, "given enough time, a plan that met with all of [my] criteria and retained three majority-black districts could be developed." I attempted to explain, in my last meeting with the Republican caucus, that such a plan was logically possible,

given my understanding of the requirements of minority representation, but that the evidence of the preceding ten days had convinced me that no such plan would be likely to result from further deliberation. The suggestion that I was "unwilling to spend time" to provide the people of New Jersey with the best possible map because I "simply wanted to go home" is both patently false and offensive. I emphasized to both sides at various points in our deliberations that the looming primary filing deadline made a quick resolution highly desirable, but that my overriding concern was to produce a satisfactory plan. I believe that the plan adopted by the Commission, NJ2001, is a highly satisfactory solution to the complex task that faced us.

30. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

**/s/ Larry M. Bartels**

Larry M. Bartels

***15 April 2001***

Date

FLW8888
PITNEY, HARDIN, KIPP & SZUCH LLP
(Mail to) P.O. Box 1945 Morristown, N.J. 07962-1945
Delivery to) 200 Campus Drive, Florham Park, N.J. 07932-0950
(973) 966-6300

ATTORNEYS FOR PLAINTIFFS

**RECEIVED**
**APR 12 2001**
**AT 8:30. . . . . M**
**WILLIAM WALSH,CLERK**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

DONALD PAGE, GERTRUDE WATERS, HAROLD EDWARDS, KATHY EDWARDS, WILLIAM COSTLY, CAROL G. SCANTLEBURY, JOSE A. CABEZA, VICTOR CABEZA, ANTONIO J. ALMEIDA, MARIO H. NENO, DAVID VARGAS, ELVI VASQUEZ, JOSEPH ARTEAGA, FRED SHAW, AARON COLLINS, CHARLES ROBINSON, ALLEN BARNHARDT, THE STATE SENATGE REPUBLICAN MAJORITY, ASSEMBLY REPUBLICAN MAJORITY,

Plaintiffs,

v.

LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LOUIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacity as Members of the State of New Jersey Apportionment Commission, STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DE4FOREST B. SOARIES, JR., Secretary of State of the State of New Jersey, JOHN FARMER, Attorney General of the State of New Jersey,

Defendants.

---

Civil Action No. 01-1733

---

**VERIFIED COMPLAINT FOR VIOLATIONS OF THE VOTING RIGHTS ACT AND THE CONSTITUTION OF THE UNITED STATES**

---

PLAINTIFFS, Gertrude Waters, Harold Edwards, Kathy Edwards, William Costly, Carol G. Scantlebury, Jose A. Cabeza, Victor Cabeza, Antonio J. Almeida, Mario H. Neno, David Vargas, Elvi Vasquez, Joseph Arteaga, Fred Shaw, Aaron Collins, Charles Robinson, Allen Varnhardt, the State Senate Republican Majority, and the Assembly Republican Majority, by their attorneys, Pitney, Hardin, Kipp & Szuch LLP, complaining of the defendants, Larry Bartels, The Honorable Richard Codey, The Honorable Sonia Delgado, The Honorable Thomas Giblin, Lewis Greenwald, Bonnie Watson-Coleman, in

their official capacity as Members of the State of New Jersey Apportionment Commission, DeForest B. Soaries, Jr., Secretary of State of the State of New Jersey, John Farmer, Attorney General of the State of New Jersey, and the State of New Jersey Apportionment Commission, say:

**PARTIES AND SUBJECT MATTER JURISDICTION**

1. Plaintiff Donald Page is a Black registered voter residing in Essex County and the 27th district.

2. Plaintiff Gertrude Waters is a Black registered voter residing in Essex County and the 27th district.

3. Plaintiff Harold Edwards is a Black registered voter residing in Essex County and the 29th district.

4. Plaintiff Kathy Edwards is a Black registered voter residing in Essex County and the 29th district.

5. Plaintiff William Costly is a Black registered voter residing in Essex County and the 29th district.

6. Plaintiff Carol Scantlebury is a Black registered voter residing in Essex County and the 27th district.

7. Plaintiff Jose Cabeza is a Hispanic registered voter residing in Essex County and, upon information and belief, the 27th or the 28th district.

8. Plaintiff Victor Cabeza is a Hispanic registered voter residing in Essex County and, upon information and belief, the 27th or 18th district.

9. Plaintiff Antonio J. Almeida is a Hispanic registered voter residing in Hudson County and the 32nd district.

10. Plaintiff Maria H. Neno is a Hispanic registered voter residing in Hudson County and the 32nd district.

11. Plaintiff David Vargas is a Hispanic registered voter residing in Essex County, and, upon information and belief, the 27th or 18th district.

12. Plaintiff Elvi Vasquez is a Hispanic registered voter residing in Essex County and, upon information and belief, the 27th or 28th district.

13. Plaintiff Joseph Arteaga is a Hispanic registered voter residing in Essex County and, upon information and belief, the 27th or 28th district.

14. Plaintiff Fred Shaw is a black registered voter residing in Essex county and the 27th district.

15. Plaintiff Aaron Collins is a Black registered voter residing in Essex County and the 27th district.

16. Plaintiff Charles Robinson is a Black registered voter residing in Essex County and the 27th district.

17. Plaintiff Allen Barnhardt is a Black registered voter residing in Essex County and the 27th district.

18. Plaintiffs, the New Jersey State Senate Republican Majority (SRM) and Assembly Republican Majority (ARM),consists of citizens of the State of New Jersey who have been duly elected as Senators/Assemblymen from previously constituted legislative districts and currently serve in the New Jersey Legislature and comprise the majority of each of the respective houses.

19. Defendant DeForest B. Soaries is the Secretary of State of the State of New Jersey, who has responsibility to ratify and implement any new apportionment plan.

20. Defendant John Farmer is the incumbent Attorney General of the State of New Jersey and is empowered faithfully to execute the laws of the State of New Jersey, putting into effect apportionment plans related

to realigning New Jersey's Legislative Districts following each decennial census.

21. Defendant State of New Jersey Apportionment Commission is a body composed of eleven members, five from each of the two political parties whose Gubernatorial Candidates received the most votes at the last gubernatorial election, the eleventh member is appointed by the Chief Justice of the State of New Jersey.

22. Defendant Larry Bartels is the "eleventh member" of the Apportionment Commission, who has no political affiliation and has never registered to vote or voted in New Jersey.

23 .Defendants Richard Codey, Sonia Delgado, Thomas Giblin, Lewis Greenwald, and Bonnie Watson-Coleman are Democrat members of the Apportionment Commission, who, together with Defendant Bartels, constituted those members who voted to adopt an apportionment map for New Jersey's Assembly and Senatorial Districts that violates the Voting Rights Act of 1965 and the 14th and 15th Amendments to the United States Constitution.

24. The actions of the defendants that form the basis of this action state claims that arise under the Fourteenth and Fifteenth Amendments to the United States Constitution, as well as under the Voting Rights Act of 1965, 42 U.S.C. Sec. 1973 *et seq.*

25. This Court accordingly has subject matter jurisdiction over this action pursuant to 28 U.S.C. Secs. 1331 and 1343 (4), 42 U.S.C. Sec. 1121 and, with respect to certain claims, 28 U.S.C. Sec. 1367.

26. Venue is proper in this District because the actions giving rise to the present controversy all occurred within the State of New Jersey.

## ALLEGATIONS COMMON TO ALL COUNTS

## THE APPORTIONMENT COMMISSION

27. By virtue of Article 4, Sec. 3, 1 of the New Jersey State Constitution the people of the State of New Jersey created an Apportionment Commission. The people's charge to a properly constituted Apportionment Commission is the duty to apportion legislative districts within the State of New Jersey, consistently with law to give all New Jersey citizens a voice in the governance of their affairs to assure them equal protection of the laws.

28. The Apportionment Commission is required to meet after the results of the decennial census of the United States are reported in order to realize legislative districts following the census to reflect shifts in population.

29. Pursuant to Article 4, Sec. 3, 1 of the New Jersey State Constitution, the Apportionment Commission is constituted of ten members, five of whom are to be appointed by the Chairman of the State committee of each of the two political parties whose candidates for governor receive the largest number of votes at the most recent gubernatorial election. In the present case, the Chairmen of the Republican and Democratic State committees were entitled to appoint five members each, which each did.

30. Pursuant to Article 4, Sec. 3, 1 of the New Jersey State Constitution, appointments to the commission must be made on or before November 15 of the year in which the United States decennial census is taken and certified by the Secretary of State on or before December 1

of the same year. The last decennial census was conducted in 2000.

31. Pursuant to Article 4, Sec. 3, 1 of the New Jersey State Constitution, the Apportionment Commission, by a majority of a whole number of its members, shall certify the establishment of Senate and Assembly Districts and the apportionment of senators and members of the General Assembly to the Secretary of State within one month of the receipt of the governor of the official decennial census of the United States for New Jersey or on or before February 1 of the year following the year in which the census is taken, whichever is later.

32. Pursuant to Article 4, Sec. 3, Para. 2 of the New Jersey State Constitution, if the Apportionment Commission fails to certify the establishment of Senate and Assembly Districts and the apportionment of senators and members of the General Assembly to the Secretary of State on or before the date fixed for such certification, or, if prior to that date determines that it will be unable to do so, it is required to submit a certification to that effect to the Chief Justice of the New Jersey Supreme Court, who then, by Constitutional direction, appoints an eleventh member to the commission.

33. Pursuant to Article 4, Sec. 3, Para. 2 of the New Jersey State Constitution, the Apportionment Commission is thereafter empowered to certify the establishment of Senate and Assembly Districts and the apportionment of senators and members of the General Assembly to the Secretary of State within one month of the appointment of the eleventh member.

34. The purpose of apportioning legislative districts is to ensure that the districts are approximately equal in population and to assure that the political process

of legislating is equally open to all citizens of the State of New Jersey.

## THE ELEVENTH MEMBER

35. In or around November, 2000, the ten members of the Apportionment Commission were appointed.

36. From in or around February, 2001 through and including March 26, 2001, the Apportionment Commission held several meetings. At those meetings, the Democratic members refused to participate in the State redistricting and did not exchange with the Republican members of the Apportionment Commission a map setting forth their proposed districts.

37. Because of the lack of participation by the Democratic members, a majority appointed members of the Apportionment Commission determined by a vote of eight to two that they would be unable to certify the establishment of Senate and Assembly Districts and the apportionment of senators and members of the general Assembly to the Secretary of State on or before the date fixed for such certification. As a result, the Apportionment Commission submitted a certification to that effect to the Chief Justice of the New Jersey Supreme Court, who, pursuant to Article 4, Sec. 3, Para. 1 of the New Jersey State Constitution, appointed defendant Larry Bartels on the same day she received certification of the Commission's impasse as the so-called eleventh member to the Apportionment Commission.

38. The Appointment of defendant Larry Bartels occurred on or about March 26, 2001.

39. After appointment of the eleventh member, votes were held among all the members to hold a fifth

public hearing and to determine whether maps proposed by the parties would be shown to the public at the future fifth public meeting.

40. Only the Republican Members of the Commission and the eleventh member voted in favor of the proposed fifth public hearing. The vote as to releasing the maps again was split along party lines, with the Republican members in favor of allowing the public to view the maps, and the Democratic members against. Bartels indicated that he felt releasing the maps to the public would be counterproductive and that he would side with the Democrats against the plan.

41. Thereafter, the Republican members of the Commission and the Democrat members exchanged maps of their proposed redrawn districts to Bartels, who generally forwarded copies to the other delegation.

42. A total of five Republican and three Democrat Plans were submitted to the Eleventh Member, with some plans having several variations based on suggestions from Bartels or the opposing side.

## THE HISTORY OF ESSEX COUNTY

43.As a basis for determining the new districts, population information gathered during the 2000 decennial census was utilized by the committee members.

44. Since 1981, three majority minority districts have existed in the State of New Jersey the 27$^{th}$, 28$^{th}$ and 29$^{th}$ which elect a total of nine representatives – three senators and six assemblymen.

45. Of the nine representatives from the three majority minority districts, seven were black.

46. There is significant evidence in Essex County of racial bloc voting among Whites, Blacks and Hispanics along racial lines to the detriment of other races.

47. Over the last decade, two Black candidates have sought election to the office of County Executive: 1994, Cardell Cooper and in 1998, Ken Gibson, the former Mayor of Newark. In 1994, Cardell Cooper was opposed by defendant Tom Giblin, who at the time was the Democratic County Chairman and is presently the State Democratic Party Chairman as well as a member of the Apportionment Committee.

48. The 1994 primary resulted in a tie, which was subsequently challenged by Mr. Cooper for three months, after which time Mr. Cooper was declared to be the winner. Mr. Cooper then challenged the Republican candidate Jim Treffinger. Mr. Cooper was aligned with Frank Lautenburg, Armand Fontura, and other Democratic candidates for county wide office. The election results afforded Frank Lautenburg a substantial win by approximately 50,000 votes, Armand Fontura secured a win with 20,000 votes and Mr. Cooper lost by 3,000 votes.

49. There was a significant drop in support for Mr. Cooper in significantly white communities, demonstrating that white Democrats abandoned Cardell Cooper on the general election ballot.

50. In 1998, there was no opposition in the Democratic primary, and the then County Chairman Ken Gibson challenged the then incumbent Jim Treffinger. In this election, Mr. Treffinger won by over 8,000 votes. As this district is overwhelmingly Democrat, the only conclusion that can be drawn from a Republican win is that the white Democrats supported the white candidate, although he was Republican.

51. An analysis of other races reveals similar racial bloc voting trends (i.e. preferring one's own race to the general exclusion of others). (A true copy of one such Racial Bloc Voting Analysis is attached hereto as Exhibit A). The Commission was aware of and in possession of this evidence when it passed the final "Bartels plan."

## THE COMMITTEE PROCEEDINGS

52. On or about April 2, 2001, the Commission met at the Doral Forrestal in Princeton Junction, New Jersey. Thereafter, the Republican delegation requested, but never received, a list of criteria that Bartels would use for assessing which map to give this tie-breaking vote. Bartels examined the parties' initial maps. The Republican delegation immediately objected to the Democrat delegation's first map, which diluted the black voters in Essex County to such an extent that it eliminated all three pre-existing majority-black districts (27, 28 and 29). The Republican plan maintained all three districts as majority-Black. The sole apparent reason for diluting the three majority Black districts, while failing to dilute a single pre-existing majority-Hispanic district, was to move Minority Leader Defendant Richard Codey from a majority-Black to a majority-white district, where he was no longer vulnerable to loosing the Democratic primary to a Black challenger.

53. In each of their successive plans submitted over the next ten days, the Democrats continued to dilute the black voters of Essex County and failed to retain even a single majority-black district. Each of the successive Republican plans retained these districts.

54. On April 6, 2001, The Honorable John O. Bennett received at his request a letter from his counsel, Matthew Stowe, discussing the serious legal difficulties posed by the elimination of existing majority-minority districts and urging the Republican delegation not to vote in favor of any plan which entirely eliminated a majority minority district on the grounds that such a plan would violate federal law and be unconstitutional on its face. Senator Bennett shared that letter with Bartels.

55. The Republican delegation renewed its request for a list of criteria and their relative weight. Professor Bartels continued to ignore this request. He did say that he viewed "fairness," to mean creating a map which a party earning 50% of the statewide vote would win 50% of the statewide seats, as the primary factor. He said he would be willing to eliminate majority-minority districts to obtain that goal. On April 7, 2001, retired New Jersey Supreme Court Justice Robert L. Clifford, serving as counsel to the Eleventh Member, requested a presentation regarding the legality of eliminating all existing majority-black districts within the State of New Jersey. Counsel for Senator Bennett and counsel for the Republican Delegation together informed Bartels and his counsel that no redistricting plan had ever attempted to eliminate all majority-black districts throughout the state, and that no such plan had ever been upheld by any court. When Bartels and his counsel inquired as to whether blacks and Hispanics could be grouped together to create "majority-mixed-minority" districts in place of majority-black districts, statisticians and staff for the Republican delegation explained that the right of an individual in a particular minority group to cast an undilute ballot was particular to that person's minority group, and groups

could not be aggregated, at least absent evidence of strong cross-over support between minority groups and presented evidence that Hispanics and blacks did not vote as a block and, in fact, generally voted contrary to each other's interest. Similar evidence was presented concerning black and white voting patterns.

56. On April 8, 2001, Bartels and his counsel received two separate legal memoranda from counsel for plaintiff Senator Bennett, discussing the legal implications of the elimination of existing majority-minority districts and urging strongly against the adoption of any plan that eliminated majority-minority districts. (A true copy of the Republican Commission's Memorandum of Law dated April 8, 2001 is attached hereto as Exhibit B). On that same day, Bartels and his counsel held a mini-trial where counsel for the Republican delegation and counsel for the Democrat delegation discussed the permissibility of diluting the black vote to such an extreme extent. Bartels indicated that he understood that the Republican delegation viewed the dilution of the black vote below 50% in existing majority-black districts as impermissible, absent any constitutional or demographic rationale that dictated such a result, and especially absent strong evidence of an absence of racial bloc voting. Republican staff again presented Bartels with significant evidence that racial block voting against the interest of other racial groups occurred between blacks, whites, and Hispanics in Essex County.

57. On or about that same day, Bartels finally gave meaningful feedback on a Republican plan. He listed his criteria as political fairness, minority opportunities, incumbency protection, population deviation, and overall number of competitive races. Comparing the most recent

Republican plan which had three majority-black districts and two majority Hispanic districts, with the most recent Democrat plan with no majority black districts and only one majority Hispanic district, he stated he did not have a view as to which plan was better, and that on all of his criteria the two plans were close to the same. The next day the Republican party submitted a next plan, H20, WHICH CREATED A SECOND Hispanic-majority district in addition to the one pre-existing Hispanic district, and had a third Hispanic district with a 49.88% Hispanic population. This plan was developed after Bartels suggested that, given the existing Hispanic under representation in the Legislature, he would weight districts with higher Hispanic population more heavily than districts with significant Black population. After the submission of H20, the Republican delegation had no meaningful contact with Bartels except for his recommendation to eliminate the second Hispanic majority district and one Black majority district from the Republican plan.

58. The Democrats submitted additional legal memoranda to Bartels through his counsel. When the Republicans requested an opportunity to respond, they were told by Bartels counsel, "no way. I don't want to hear a single word from you."

59. On April 11, 2001, Bartels and the members of the Democrat delegation received a letter from Laughlin McDonald of the American Civil Liberties Union pointing out the grave legal difficulties posed by the wholesale elimination of existing black-majority districts, and warning against the "consequences for minority office holders flowing from their destruction." (A true copy of the ACLU Memorandum dated April 11, 2001, is attached hereto as Exhibit C) Bartels acknowledged that he had

received, read, and understood the contents of that letter in his final meeting with the Republican delegation later that same day, and notwithstanding the views expressed in that letter would vote to adopt a plan that eliminated existing majority-black districts as the final plan.

60. On April 11, 2001, Prof. Bartels and members of the Democrat delegation received a letter from Martin Luther King, III, President and Chief Executive Officer of the Southern Christian Leadership Conference, urging "the New Jersey Legislative Districting Commission to preserve the present configuration of legislative districts 27, 28, and 29 in Essex County." (A True Copy of the Letter dated April 11, 2001 from Martin Luther King, III is attached hereto as Exhibit D). The SCLC expressed that it "strongly believe[d]that any alteration of these district lines w[ould]dilute minority representation in the New Jersey Legislature.": In his final meeting with the Republican delegation later that same day, Bartels acknowledged that he had received, read and understood the contents of that letter, and notwithstanding that letter would vote to adopt a plan that eliminated existing majority-black districts.

61. At 6:30 p.m. on April 11, 2001, Bartels held a final meeting with the Republican delegation at which he unexpectedly announced that he had decided to sign a plan which was virtually identical, with only minor changes, to the first plan submitted by the Democrats (hereinafter the "Bartels Plan"). That plan eliminated two of the three pre-existing majority-black districts, and retained the last district by a single percentage point. Comparing this plan to the Republican plan, the Republican plan maintained the three existing majority black districts and contained two majority Hispanic districts and a third Hispanic district of

49.88% while scoring better on many of his criteria and not scoring perceptibly lower on any of Bartel's criteria. (Compare Plaintiff's Exhibit E, a true copy of which is attached hereto, with Plaintiff's Exhibit F, a true copy of which is also attached hereto).

62. Bartels announced at the outset of that meeting that he believed that, given enough time, a plan that met with all of his criteria and retained three existing majority-black districts could be developed. When asked why he was unwilling to spend time to make such a map, he gave no answer. Some time later, he announced that he simply wanted to go home.

63. The Bartels map determined to redraw the three majority minority districts, and lowered the percentage of blacks in the 27th, 28th and 29th districts from 54.7%, 54.7% and 56.9% to 29.61%, 51.19% and 40.5%, respectively. It had only the one pre-existing majority Hispanic district.

64 Ultimately, the map adopted by the Apportionment Commission has the effect of diluting minority representation.

65. Although the Democratic members of the Commission and the Eleventh Member have grouped minorities together for purposes of maintaining the appearance of possible minority representation in tow of the new districts, there is no indication that the minorities within the new districts vote as blocs and, in fact, there is evidence directly contrary to that notion.

## EFFECTS OF DISSOLUTION

66. The districts proposed for Essex County by the Democratic Commission in their map, which was

subsequently affirmed by the Eleventh Member and adopted on April 11, 2001, dilutes minority representation. Two black incumbents are removed from their current district and placed in a new district (34) that includes two municipalities – Glen Ridge and Clifton – with no history of support for minority candidates. Indeed, Blacks are 3% of the population in Clifton and Latinos are 20% of the city, and in Glen Ridge Blacks are 5% of the population and Latinos only 3%. This district proposed by the Democratic Commission also splits two counties, Essex and Passaic.

67. District 27, in the Bartels map, minimizes the political voice of Blacks in the municipalities of Orange, Maplewood and South Orange, Under the 1991 map a Black state senator has represented Maplewood. Blacks now comprise 33% of the population of Maplewood and 31% of the population of South Orange. The black community in both of these municipalities is significantly middle class. The municipalities of Verona, Cedar Grove, Essex Falls and Caldwell are overwhelmingly white.

68. The Bartels map also undermines minority representation in district 28 by extending the district into the municipalities of Bloomfield and Belleville. The only areas with significant Black populations in this proposed district is Irvington and the sections of Newark that are included. Blacks represent 5% of the population of Belleville and Latinos 24%. In Bloomfield, Blacks comprise 12% of the population and Latinos 14%. The Bartels map also splits two counties in district 28: Essex and Passaic County. Moreover, the diluted map divides Essex County municipalities, in whole or part, into seven districts.

69. Once an Apportionment Commission draws a new map of legislative districts, the Attorney General is empowered to ratify the map and execute the laws of the State of New Jersey to constitute legislative districts in accordance with this new map.

70. Under Article 4, Sec. 3, Para. 3 of the New Jersey State Constitution, establishment and apportionment shall be used thereafter for the election of members of the Legislature and shall remain unaltered until the following decennial census of the United States for New Jersey shall have been received by the Governor.

71. Once the new map is ratified, the newly drawn districts remain unaltered until the following decennial census of the United States for New Jersey is received by the Governor, thereby assuring approximately ten years of effective life of the apportionment plan so adopted and ratified.

72. The next decennial census of the United States does not occur until the year 2010.

73. As a consequence, absent action by this Court, plaintiffs will suffer irreparable harm to their voting rights for a decade as well as the indignity and shame of having been deliberately singled out for under representation in their State government.

74. Additionally, if the Bartels plan is allowed to remain in effect for ten years, it may through the passage of time gain credibility and serve as a template for future apportionment – thereby perpetuating the injustice to black voters in the State of New Jersey.

## FIRST COUNT

75. Plaintiffs repeat and make a part hereof each and every allegation contained in paragraphs 1 through 74 of the Verified Complaint.

76. The elimination of majority-black districts in Districts 27 and 29 dilutes the votes of blacks and interferes with their ability to elect representatives of their choosing.

77. Under the totality of the circumstances, the adoption of the Bartels Plan results in blacks being afforded less opportunity than other members of the electorate to participate in the political process and elect the representatives of their choice.

78. Defendants' actions as alleged infringe plaintiffs' rights as protected by Sec. 2 of the Voting Rights Act of 1965.

WHEREFORE, Plaintiffs demand Judgment in their favor and as against the defendants, and such of them as follows:

1) For a preliminarily and permanent injunction, enjoining and restraining the defendants, their officers, agents, employees, servants, attorneys, and all those in action, concert or participation with them from a) employing, ratifying, or in any way putting into effect, directly or indirectly, the apportionment map, purportedly approved by the New Jersey Apportionment Commission on April 11, 2001; b) from printing, causing to be printed, distributing, disseminating or causing to be distributed or disseminated ballots or other means of effecting an election in connection with any primary election for New Jersey Legislative Districts.

2) For such other and further relief as this Court may deem just and proper, including, enjoining and restraining defendants the holding of any primary election for New Jersey Legislative Districts until further Order of this Court.

**SECOND COUNT**

79 Plaintiffs repeat and make a part hereof paragraphs 1 – 78 of this Complaint.

80. The Bartels Plan, as adopted by a 6-1 vote o the Apportionment Commission, purposefully and intentionally dilutes the voting powers of New Jersey citizens of African-American descent in a manner that denies and abridges the right of black citizens of the United States to vote on the grounds of their race or color.

81. The Bartels Plan, as adopted by a 6-1 vote of the Apportionment Commission, accordingly purposefully and intentionally violates Sec. 2 of the Voting Rights Act of 1965.

82. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs demand Judgment in their favor and as against the defendants, and such of them as follows:

1) For a preliminarily and permanent injunction, enjoining and restraining the defendants, their officers, agents, employees, servants, attorneys, and all those in action, concert or participation with them from a) employing, ratifying, or in any way putting into effect, directly or indirectly, the apportionment map, purportedly approved by the New Jersey Apportionment Commission on April 11, 2001; b) from printing, causing to be printed, distributing, disseminating or causing to be distributed or

disseminated ballots or other means of effecting an election in connection with any primary election for New Jersey Legislative Districts.

2) For such other and further relief as this Court may deem just and proper, including, enjoining and restraining defendants the holding of any primary election for New Jersey Legislative Districts until further Order of this Court.

**THIRD COUNT**

83.Plaintiffs repeat and make a part hereof each and every allegation contained in paragraphs 1 through 82 of the Verified Complaint,.

84. The Bartels Plan was intentionally adopted by the Apportionment Commission for the discriminatory purpose of diluting the voting power of Blacks and Hispanics on account of their race or color.

85. Ratification and employment of the Bartels Plan, purported to be adopted by the Apportionment Commission on April 11, 2001, violates Plaintiffs' rights to Due Process and Equal Protection as guaranteed by the 14th Amendment of the United States Constitution.

86. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiffs demand Judgment in their favor and as against the defendants, and such of them as follows:

1) For a preliminarily and permanent injunction enjoining and restraining the defendants, their officers, agents, employees, servants, attorneys, and all those in action, concert or participation with them from a) employing, ratifying, or in any way putting into effect, directly or indirectly, the apportionment map, purportedly

approved by the New Jersey Apportionment Commission on April 11, 2001; b) from printing, causing to be printed, distributing, disseminating or causing to be distributed or disseminated ballots or other means of effecting an election in connection with any primary election for New Jersey Legislative Districts.

2) For such other and further relief as this Court may deem just and proper, including, enjoining and restraining defendants the holding of any primary election for New Jersey Legislative Districts until further Order of this Court.

## FOURTH COUNT

87. Plaintiffs repeat and make a part hereof each and every allegation contained in paragraphs 1 through 86 of the Verified Complaint.

88. The Bartels Plan was intentionally adopted by the Apportionment commission for the discriminatory purpose of diluting the voting power of Blacks and Hispanics on account of their race or color.

89. Defendants' actions as alleged violate Plaintiffs' rights under the 15th Amendment of the United States Constitution.

90. Plaintiffs have no adequate remedy at law.

**WHEREFORE,** Plaintiffs demand Judgment in their favor and as against the defendants, and such of them as follows:

1) For a preliminarily and permanent injunction, enjoining and restraining the defendants, their officers, agents, employees, servants, attorneys, and all those in

action, concert or participation with them from a) employing, ratifying, or in any way putting into effect, directly or indirectly, the apportionment map, purportedly approved by the New Jersey Apportionment Commission on April 11, 2001; b) from printing, causing to be printed, distributing, disseminating or causing to be distributed or disseminated ballots or other means of effecting an election in connection with any primary election for New Jersey Legislative Districts.

2) For such other and further relief as this Court may deem just and proper, including, enjoining and restraining defendants the holding of any primary election for New Jersey Legislative Districts until further Order of this Court.

PITNEY, HARDIN, KIPP & SZUCH, LLP
Attorneys for All Plaintiffs

**/s/ Frederick L. Whitmer**

**By:**_____
FREDRICK L. WHITMER
A Member of the Firm

Dated: April 12, 2001

## VERIFICATION

STATE OF NEW JERSEY ) ss:
COUNTY OF MORRIS )

John O. Bennett, III, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am a duly and lawfully elected Senator of the State of New Jersey and am a duly authorized member of the Senate Republican Majority, one of the plaintiffs in this action. I have also served as a lawfully appointed member of the current New Jersey Apportionment Commission.

2. I have read the foregoing Verified Complaint and all the allegations contained therein. All such allegations are true based on my personal knowledge, except as to those matters herein alleged upon information and belief, in which cases, I believe them to be true.

**/s/ John O. Bennett III**

John O. Bennett, III

Sworn and subscribed to before
Me this 12th day of April, 2001

***/s/ Signature Illegible***

~~NOTARY PUBLIC~~
An Attorney at Law of the State of New Jersey

**NORMAN M. ROBERTSON**
Suite 102B
Overlook at Great Notch
150 Clove Road
Little Falls, NJ 07424
(201) 709-1390
**Appearing Pro Se**

**JAMES A. ROBERTSON**
Kalison, McBride, Jackson
& Murphy, P.A.
645 Martinsville Road
Liberty Corner, NJ 07938
(908) 647-4600
**Attorneys for Appellants**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 01-2024

NORMAN M. ROBERTSON, JOHN COIRO, EUGENE KULICK, GARRY COLLETTI, JAY R. SCHWARTZ, DENNIS E. GONZALEZ, GERALD H. ZECKER

Plaintiffs

v.

LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacities as members of the State of New Jersey Apportionment Commission, the STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DEFOREST B. SOARIES, JR., Secretary of State of the State of New Jersey, and JOHN FARMER, Attorney General of the State of New Jersey,

Defendants.

Civil Action No. 01-2024

FILED
April 26, 2001
William T. Walsh, Clerk

---

**VERIFIED COMPLAINT FOR VIOLATIONS OF THE CONSTITUTION OF THE UNITED STATES**

---

Plaintiffs, DENNIS E. GONZALEZ, JOHN COIRO, EUGENE KULICK, GARRY COLLETTI, JAY R. SCHWARTZ and NORMAN M. ROBERTSON, by way of complaint against the defendants, LARRY BARTELS, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD, BONNIE WATSON COLEMAN, in their official capacities as Members of the New Jersey State Apportionment Commission, the STATE OF NEW JERSEY APPORTIONMENT COMMISSION, DEFOREST B. SOARIES, JR., Secretary of State of New Jersey, and JOHN FARMER, Attorney General of the State of New Jersey, say:

**PARTIES AND SUBJECT MATTER JURISDICTION**

1. Plaintiff, DENNIS E. GONZALEZ, was and is a near lifelong resident of Passaic County, New Jersey and is of Puerto Rican descent. In January, 2001, he changed his residence form Paterson in Passaic County to Clifton, also in Passaic County. He is a registered voter in the 34th Legislative District. He is the New Jersey Chair of the Republican

National Hispanic Assembly and was a candidate for the New Jersey General Assembly from the 35th District in 1995.

2. Plaintiff, JOHN COIRO, is a registered voter in the current 34th Legislative District of New Jersey. He resides in Borough of Totowa in Passaic County and serves as the Borough's Mayor.

3. Plaintiff, EUGENE KULICK, is a registered voter in the current 34th Legislative District of New Jersey. He resides in the Township of Little Falls in Passaic County and serves as the town's Mayor.

4. Plaintiff, GARRY COLLETTI, is a registered voter in the proposed 34th Legislative District of New Jersey. He resides in the Borough of West Paterson and serves as the Borough's Mayor.

5. Plaintiff, JAY R. SCHWARTZ, was and is a near lifelong resident of the State of New Jersey. He was born and raised in the Borough of West Paterson. In March, 2001, he moved his residence less than one mile to the Township of Little Falls in Passaic County. He is a registered voter in the current 34th Legislative District.

6. Plaintiff, NORMAN M. ROBERTSON, is a resident of the City of Clifton, County of Passaic and State of New Jersey and is a registered voter therein. He resides in the 34th Legislative District and is the incumbent Senator representing the 34th District. He is of Irish-American and Scottish-American extraction, is of the Caucasian race and the Roman Catholic faith.

7. The Defendant, the APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY (hereinafter, the "APPORTIONMENT COMMISSION"), is a body constituted pursuant to Article IV, Section III of

the Constitution of the State of New Jersey and has operated and is operating under color of law. The APPORTIONMENT COMMISSION is empowered to certify the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly to the Secretary of State of the State of New Jersey.

8. The APPORTIONMENT COMMISSION is comprised of ten members "five to be appointed by the chairman of the State committee of each of the two political parties whose candidates for Governor receive the largest number of votes at the most recent gubernatorial election." The 2001 Apportionment Commission initially consisted of five Democrats and five Republicans. Article IV, Section III of the New Jersey Constitution empowers the Chief Justice of the New Jersey Supreme Court to appoint an eleventh member to the APPORTIONMENT COMMISISON in the event that the Commission fails to certify the establishment of Senate and Assembly districts and the apportionment of senators and members of the General Assembly in a timely fashion or in the event that the Commission certifies to the Chief Justice that it is unable to do so.

9. Defendant, LARRY BARTELS is the "Eleventh Member" of the APPORTIONMENT COMMISSION duly appointed by the Chief Justice pursuant to the provisions of the New Jersey Constitution.

10. Defendants, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD, and BONNIE WATSON-COLEMAN are members of the APPORTIONMENT COMMISSION appointed by the chairman of the Democratic State Committee and who,

together with the defendant, LARRY BARTELS, voted to adopt an apportionment map for New Jersey's Senate and Assembly districts in violation of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, and in violation of the Constitution of the State of New Jersey.

11. Defendant DEFOREST B. SOARIES, JR. is the Secretary of State of the State of New Jersey and is empowered by state law to ratify and implement any new districting and apportionment plan certified by the defendant APPORTIONMENT COMMISSION.

12. Defendant, JOHN FARMER, is the Attorney General of the State of New Jersey and is empowered by state law faithfully to execute state laws relating elections and to the implementation of any new districting and apportionment plan certified by the defendant, the APPORTIONMENT COMMISSION.

13. The actions of the defendants that form the basis of this action violate and state claims arising under the First, Fourteenth and Fifteenth Amendments to the United States Constitution and provisions of the Constitution of the State of New Jersey. Accordingly this court has subject matter jurisdiction over this action pursuant to 28 U.S.C. sec. 1331 *et seq*.

**ALLEGATIONS COMMON TO ALL COUNTS**

14. After each decennial census of the United States, the defendant APPORTIONMENT COMMISSION is required to certify new Senate and Assembly districts and to apportion the senators and Members of the General Assembly among them.

15. In or about November, 2000, the state committee chairmen of the New Jersey Republican and Democratic parties appointed representatives to serve on the APPORTIONMENT COMMISSION. The defendants, RICHARD CODEY, SONIA DELGADO, THOMAS GIBLIN, LEWIS GREENWALD and BONNIE WATSON-COLEMAN were appointed by the state chairman of the New Jersey Democratic State Committee.

16. On or about March 27, 2001, the Chief Justice of the New Jersey Supreme Court appointed the defendant, LARRY BARTELS, to be the Eleventh Member of the defendant APPORTIONMENT COMMISSION.

17. Article IV, Section II, paragraph 1 of the New Jersey Constitution requires that "each Senate district shall be composed, wherever practicable, of one single county, and if not so practicable, of two or more contiguous whole counties." Article IV, Section II, paragraph 3 requires that each Assembly district be composed of "contiguous territory, as nearly compact and equal in the number of the inhabitants as possible . . ." Paragraph 3 also states: "Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State . . ."

18. During the period in and around February, 2001 through and including March 26, 2001, the ten-member APPORTIONMENT COMMISSION held several meetings at which the Democratic members refused to exchange with Republican members a map setting forth their proposed districts.

19. Following the appointment of the Eleventh Member on March 27, 2001, the APPORTIONMENT COMMISISON met and considered the question of the release of proposed maps to the public for comment at a public meeting. Defendant BARTELS and defendants CODEY, DELGADO, GIBLIN, GREENWALD and WATSON-COLEMAN voted to keep the proposed maps away from public view and inspection.

20. During the period April 2, 2001 through April 11, 2001, the APPORTIONMENT COMMISSION met at the Doral Forestal in Princeton Junction, New Jersey. During this period, the Eleventh Member met separately with the Republican and Democratic commissioners and considered a variety of redistricting plans submitted by both groups.

21. In a certification in a related proceeding before this court (*Page et als. v. Bartels, et als.*, Civil Action No. 01-1733), the Eleventh Member, defendant LARRY BARTELS, stated that "in the process of evaluating competing redistricting proposals, I paid close attention to racial and ethnic data and electoral opportunities." At para. 6. In addition, defendant BARTTELS stated that he paid close attention to several other criteria, including "(1) minimizing the population deviations among the districts, as required by the 'one person one ovte' rule; (2) keeping each of the forty districts contiguous; (3) keeping each of the forty districts reasonably compact; (4) respecting municipal boundaries by not splitting any towns other than Newark and Jersey City (which are too large to fit in one legislative district); (5) respecting voting-district boundaries; (6) avoiding any bias in the map that might favor one political party over

the other in an election year when the two parties were tightly competitive; (7) ensuring that some seats were competitive so that the composition of the Legislature would be responsive to shifts in votes from one party to the other; and (8) minimizing voter disruption, so as not to deny too many New Jersey citizens the opportunity to vote for incumbents who had served them well or against incumbents who had not done so." At para. 7.

22. At or about 10:30 P.M. on April 11, 2001, the APPORTIONMENT COMMISSIOIN met on less than one hour's notice to vote on a redistricting plan. Theretofore, no proposed plans had been released to the public. No public comment was entertained by the APPORTIONMENT COMMISSION at the late night meeting despite a request from Plaintiff-Senator ROBERTSON to be heard. The Commission chair, defendant CODEY, refused to entertain either debate or questions concerning the plan from the lone Republican commissioner present. A redistricting plan "NJ2001" was adopted by the defendant APPORTIONMENT COMMISSION by a 6 to 1 vote with defendants BARTELS, CODEY, DELGADO, GIBLIN, GREENWALD and WATSON-COLEMAN voting in the affirmative. A Copy of the redistricting plan is attached hereto as **Exhibit A**.

**COUNT ONE:**
**Unconstitutional Race-Based Redistricting**

23. Plaintiffs repeat and reallege all of the allegations contained in paragraphs 1 through 22 as if set forth in full herein.

24. In the setting of boundaries for the 34th Legislative District, the defendant APPORTIONMENT COMMISSION, through the votes of defendants BARTELS, CODEY, DELGADO, GIBLIN, GREENWALD and WATSON-COLEMAN, engaged in impermissible race-based redistricting ("racial gerrymandering") in violation of the provisions of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

25. The racial gerrymandering of the 34th district also affected the 27th and 28th districts wherein voters were subjected to unnecessary disruption and, ironically (and cynically), to the dilution of minority influence in violation of the provisions of the Voting Rights Act.

26. In public statements and in a certification in a related proceeding in this court (*Page et als. v. Bartels et als.*, Civil Action No. 01-1733), defendant BARTELS repeatedly committed himself to "expanding" opportunities for minority representation.

27. In paragraphs 6 and 12 of his certification, defendant BARTELS cited what he apparently thought was the meaning of the voting Rights Act and the Federal Constitution. He stated that "in the process of evaluating competing redistricting maps, I paid close attention to racial and ethnic data and electoral opportunities." Bartels

certification, para. 6. He also declared: "I was . . . determined not to adopt any plan that would significantly threaten the reelection chances of incumbent minority legislators, and furthermore, I was determined to examine possibilities for expanding minority representation." Bartels Certification, para. 12.

28 .Toward the end of protecting minority legislators and creating opportunities for expanding minority representation, defendant BARTELS in his certification alleges to have weighed several bits of "evidence," including discussions between his legal counsel, Robert Clifford, and "three allegedly endangered incumbent minority legislators." Bartels certification, para. 12. These discussions with minority legislators were had despite the fact that defendant BARTELS voted with the other commissioner defendants not to release the details of proposed plans during their meetings and not to permit any public comment on the final plan prior to its enactment at the short-notice, late-night meeting on April 11.

29. Taking all of his "evidence" into account, defendant BARTELS concluded: "I was (and am) convinced that every minority incumbent who seeks reelection in 2001 under NJ2001 [the Bartels plan] has a strong opportunity to be reelected. Moreover, I believe that NJ2001 is superior to GOP-H20 (or any other plan proposed by the Republicans) in terms of creating *new* opportunities for minority candidates to win seats in the Legislature." Bartels certification, para. 12 (emphasis in the original).

30. The "new opportunities for minority candidates to win seats" created by the Bartels plan were

intended to be found in district 34 in which race was the predominant consideration.

31. While attempting to protect all other minority incumbents, the Bartels plan placed 27th district incumbents, Assemblywoman Nia Gill of Montclair and Assemblyman LeRoy Jones of East Orange (both African-American), into District 34 with the 34th district's incumbents, Senator and plaintiff NORMAN M. ROBERTSON and Assemblyman Gerald Zecker (both white, both of Clifton). In doing so, the Bartels plan removed four strong Republican towns from the current 34th district and replaced them with two large Democratic strongholds – East Orange and Montclair.

32. The result is a district that is lopsided enough to serve the defendants' race-based objective. In 1997, the Democratic State Senate candidate in the current 34th district received 46.06% of the vote. The Democratic State Senate candidates of the proposed District 34 received 64.84% of the vote in 1997. Similarly, Democratic candidate for Governor, Jim McGreevy received 43..8% of the vote in 1997 against incumbent Governor Christine Whitman in the current District 34. In the towns of the proposed 34th district, McGreevy received 62.54% of the vote. Last year, Democratic Presidential candidate Al Gore received 53.21% of the vote in the current District 34 as compared with 71.5% in the 34th district proposed by the Bartels plan.

31. Clearly, traditional redistricting criteria were subordinated to race in the construction of District 34. Although the plan adopted did not appear to violate the New Jersey constitutional requirements of contiguity, compactness and respect for municipal boundaries,

everything else took a back seat to race as a consideration. This was true even of the factors cited by defendant BARTELS in his certification:

- **Equal Population**: The "ideal" population for a legislative district following the 2000 census is 210,359. Bartels certification, para. 11. The current District 34 contains 208,442 inhabitants. The district 34 proposed in the Bartels plan contains only 205,731.

- **Avoiding Partisan Bias**: Defendant BARTELS stated in his certification that both the Republican and Democratic plans "seemed approximately unbiased, with a slight advantage for NJ2001 (since the modest bias that appears in NJ2001 seems to work *against* the party that supported the plan)." Bartels Certification, para. 18.

- **Competitiveness and Responsiveness**: Defendant BARTELS noted in his certification that "In each plan the partisan balance of competitive races was approximately even. . . . Adjustments for incumbency (or for incumbency plus turnout differentials) significantly increased the number of projected competitive races under both plans, but did not clearly favor either plan over the other with respect to competitiveness or responsiveness." Bartels Certification, para. 18. The current District 34 is quite competitive. It was carried by Republican Governor Whitman in 1997 by 7,437 votes and by Democratic Vice President Gore in 2000 by 4,953. The 34th District proposed by the Bartels plan is far less competitive. The towns in the proposed district gave Democrat McGreevy a 13,399 vote plurality over Republican Whitman in 1997 and supplied Democrat Gore with a 29,004 vote victory over Republican Bush.

- **Minimizing Voter Disruption:** Defendant BARTELS noted in his certification that approximately 58% of New Jerseyans would be able to vote (or not vote) for all three of their current incumbent legislators under the Republican plan and approximately 66% under the plan he and the other commissioner defendants adopted. Bartels certification, para. 21. The proposed District 34 stands in stark contrast to these numbers. NONE of the residents of the proposed District 34 will be able to consider all three of their incumbents.

32. Most disturbing is the fact that defendant BARTELS and the other commissioner defendants totally ignored the traditional redistricting principle of community of interest when constructing their proposed District 34. East Orange was torn away from its traditional Essex County neighbors of Orange, West Orange and South Orange and placed in a district with the Passaic County towns of Clifton and West Paterson – towns with which East Orange has little in common racially, demographically, socially or economically.

33. Plaintiffs COIRO, COLLETTI and KULICK reside in and are the Mayors of the Passaic County towns of Totowa, West Paterson and Little Falls respectively. Collectively, these towns are known as the "Passaic Valley" towns. They enjoy a similar history, similar demographics, shared media, and shared institutions. Their children go to the same high school, Passaic Valley High School. The towns look to share services and to engage in all manner of regional cooperation.

34. Under the Bartels plan, Totowa, West Paterson and Little Falls will be sent to three different

legislative districts. These districts have their centers of gravity in three different counties. This absurd result came as a consequence of race being the predominant consideration in the construction of District 34. As a result, the Passaic Valley towns will see their collective influence in Trenton vastly and unfairly diminished.

35. The Bartels plan also totally disregarded the traditional respect for county boundaries. Despite the language of the New Jersey Constitution which states that "each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties," (N.J. Const. Art. IV, Sec. II, para. 1), defendant BARTELS and the other commissioner defendants ignored plans that would have resulted in a District 34 that was far truer to county lines. This would have been far more consistent with New Jersey's history and to traditional principles of redistricting.

36. All of the foregoing taken together, it is clear that the proposed District 34 was constructed with a race-based outcome as the predominant consideration to the subordination of traditional principles of redistricting. As such, the plan adopted by the defendant APPORTIONMENT COMMISSION is an impermissible racial gerrymander in violation of the Fourteenth and Fifteenth amendments of the Constitution of the United States.

**WHEREFORE**, plaintiffs demand Judgment against the defendants as follows:

(1) For an order declaring the redistricting plan adopted by the defendant APPORTIONMENT

COMMISSION on April 11, 2001 as unconstitutional and void and of no force and effect and enjoining and restraining the defendants, their officers, agents, employees, servants, attorneys, and all those in action, concert or participation with them from: (a) employing, ratifying, or in any way putting into effect, directly or indirectly, the said redistricting and apportionment plan; and (b) from printing, causing to be printed, distributing, disseminating or causing to be distributed or disseminated ballots or other means of effecting an election in connection with any primary election for New Jersey Senate and General Assembly.

(2) For such other and further relief as this Court may deem just and proper, including, but not limited to enjoining and restraining the defendants from the holding of any primary election for New Jersey Senate and General Assembly until further order of this Court or ordering the maintenance of the current District 34 lines and awarding attorneys fees, expenses and costs of suit.

**COUNT TWO: DISPARATE TREATMENT OF INCUMBENTS ON THE BASIS OF RACE**

37. The plaintiffs repeat and reallege each of the allegations contained in paragraphs 1 through 35 as if set forth in full herein.

38. In his certification in a related proceeding before this court (in *Page v. Bartels*, Civil Action No. 01-1733), defendant BARTELS stated as follows:

- "in the process of evaluating competing redistricting maps, I paid close attention to racial and ethnic data and electoral opportunities. Para. 6.

- "I was . . . determined not to adopt any plan that would significantly threaten the reelection chances of incumbent minority legislators." Para. 12.

- "I was (and am) convinced that every minority incumbent who seeks reelection in 2001 under NJ2001 has a strong opportunity to be reelected." Para. 12.

- "I considered the incumbency of current members of the Legislature to be relevant with respect to minority representation, partisan balance, and minimizing voter disruption. The plan adopted by the commission, NJ2001, produces one forced primary and a handful of other difficult reelection contests, but does not seem to me to pose any significant threats to minority representation." Para. 22.

39. In furtherance of his goal of protecting only minority incumbents, defendant BARTELS dispatched his legal counsel to meet with three minority legislators to discuss their chances in the upcoming election. This special meeting stands in curious contrast to the fact that defendant BARTELS and the other commissioner defendants voted not to release proposed maps to the general public and refused to accept any public input during the short-notice, late-night meeting on April 11, 2001, when the Bartels plan was adopted – despite the request form plaintiff-Senator NORMAN M. ROBERTSON to speak.

40. In furtherance of his goal of protecting only minority incumbents, defendant BARTELS and the other commissioner defendants created "safe" districts for minority incumbents. In the proposed Districts 28 and 34, these safe seats come at the expense of current District 34 incumbents, Plaintiff-Senator NORMAN M. ROBERTSON, Assemblywoman Marion Crecco and Assemblyman Gerald Zecker. All three current District 34 incumbents are Caucasian.

41. Defendant BARTELS' plan to protect only minority incumbents impermissibly classifies incumbents according to race and subjects the said incumbents to disparate treatment in violation of the guarantees of equal protection afforded by the Fourteenth Amendment to the Constitution of the United States.

**WHEREFORE**, plaintiffs demand Judgment against the defendants as follows:

(1) For an order declaring the redistricting plan adopted by the defendant APPORTIONMENT COMMISSION on April 11, 2001 as unconstitutional and void and of no force and effect and enjoining and restraining the defendants, their officers, agents, employees, servants, attorneys, and all those in action, concert or participation with them from: (a) employing, ratifying, or in any way putting into effect, directly or indirectly, the said redistricting and apportionment plan; and (b) from printing, causing to be printed, distributing, disseminating or causing to be distributed or disseminated ballots or other means of effecting an election in connection with any primary election for New Jersey Senate and General Assembly.

(2) For such other and further relief as this Court may deem just and proper, including, but not limited to enjoining and restraining the defendants from the holding of any primary election for New Jersey Senate and General Assembly until further order of this Court or ordering the maintenance of the current District 34 lines, and awarding attorneys fees, expenses and costs of suit.

**COUNT THREE: UNCONSTITUTIONAL DISTRICT RESIDENCY REQUIREMENT**

42. Plaintiffs repeat and reallege all of the allegations contained in paragraphs 1 through 41 as if set forth in full herein.

43. Article IV, Section I, paragraph 2 provides as follows concerning the qualification for service in the New Jersey Senate and General Assembly:

> No person shall be a member of the Senate who shall not have attained the age of thirty years, and have been a citizen and resident of the State for four years, and of the district for which he shall be elected one year, next before his election. No person shall be a member of the General Assembly who shall not have attained the age of twenty-one years, and have been a citizen and resident of the State for two years, and of the district for which he shall be elected one year, next before his election.

44. Plaintiff, DENNIS E. GONZALEZ, moved from Paterson in Passaic County, New Jersey to nearby Clifton, also in Passaic County, in January, 2001.

He expressed a desire to run for the General Assembly from the 34th District to the office of the Attorney General. He was told that he would be ineligible to serve and could not run by virtue of the one-year district residency requirement. A copy of plaintiff GONZALEZ's letter to the Attorney General and the state's response is attached hereto as **Exhibit B**.

45. In March, 2001, plaintiff, JAY R. SCHWARTZ, moved his residence form West Paterson in Passaic County, New Jersey less than a mile to Little Falls, also in Passaic County. He expressed a desire to run for the General Assembly in the 2001 elections as a Little Falls resident. He was informed by the office of the Attorney General that he was ineligible to serve by virtue of the one year district residency requirement. A copy of plaintiff SCHWARTZ's letter to the Attorney General and its response is attached hereto as **Exhibit C**.

46. West Paterson and Little Falls are in the same zip code. They share a common high school from which plaintiff SCHWARTZ was graduated. If West Paterson and Little Falls had been put into the same district under the new apportionment plan, plaintiff SCHWARTZ would have been able to run for office. The arbitrary nature of the New Jersey rule prevents him from doing so.

47. Despite being near lifelong residents of the State of New Jersey and the County of Passaic, plaintiffs GONZALEZ and SCHWARTZ are prevented form putting themselves forward as candidates for the General Assembly in the 2001 elections.

48. Candidates for public office enjoy increased media and public attention and have greater

opportunities to be heard than if they were non-candidates. The arbitrary New Jersey rule imposing a one-year residency requirement on candidates for legislature violates the plaintiffs First and Fourteenth Amendment rights under the Constitution of the United States. The New Jersey rule also imposes an unintended penalty on those moving form one place to another within the state in violation of federally guaranteed freedom of travel.

49. The New Jersey one-year district residency requirement places an especial burden on those who are poor or are minorities. Attached as **Exhibit D** are excerpts from studies conducted by the New Jersey Department of Education relating to the student mobility rates in certain urban schools. In the 1999-2000 school year, the student mobility rate statewide was 14.3%. In suburban communities such as Wayne, New Jersey, the turnover rate can be as low as 3% to 5%. By contrast, in certain Newark schools, the turnover rate can reach as high as 60%.

50. Under the New Jersey constitutional scheme, it is possible to move across the street in Newark and find oneself in another legislative district and unable to run. If student mobility rates are inordinately high in minority, inner city areas, it is illustrative of a greater mobility rate for the minority, inner city population as a whole. As a result, minority and poor communities are particularly disadvantaged by the one-year residency requirement.

**WHEREFORE**, plaintiffs demand Judgment against the defendants as follows:

(1) For an order declaring the one-year residency requirements of Article IV, Section I of the New

Jersey Constitution as unconstitutional and void as violative of the First and Fourteenth Amendments to the United States Constitution and of no force and effect and enjoining and restraining the defendants, their officers, agents, employees, servants, attorneys, and all those in action, concert or participation with them from enforcing the said restriction.

(2) For such other and further relief as this Court may deem just and proper, including enjoining and restraining the defendants from the holding of any primary election for New Jersey Senate and General Assembly until further order of this Court and awarding attorneys fees, expenses and costs of suit.

**/s/ Norman M. Robertson**

NORMAN M. ROBERTSON
Appearing Pro Se

KALLISON, McBRIDE, JACKSON MURPHY, P.A.
Attorneys for Plaintiffs Coiro, Kulick, Colletti, Schwartz and Gonzalez

**/s/ James A. Robertson**

By: JAMES A. ROBERTSON
A Member of the Firm

Dated: April 27, 2001

## VERIFICATION

NORMAN M. ROBERTSON, of full age, being duly sworn according to law, upon hi s oath, deposes and says:

1. I am a duly elected Senator representing New Jersey's 34th Senate District. I am also an attorney at law of the State of New Jersey and a plaintiff in the within matter appearing pro se.

2. I have read the foregoing Verified Complaint and all the allegations contained therein. All such allegations are true based upon my personal knowledge, except as to those matters herein alleged upon information and belief, in which case, I believe them to be true.

**/s/ Norman M. Robertson**

NORMAN M. ROBERTSON

Sworn and subscribed to before
me this 27th day of April, 2001

**/s/ Maureen Merena**

Notary Public
Maureen Merena
Notary Public of New Jersey
Commission Expires 1/20/2002

Supreme Court, U.S.
FILED
DEC 21 2001
CLERK

No. 01-721

IN THE
# Supreme Court of the United States

NORMAN M. ROBERTSON, *et al.*,
*Appellants*,

v.

LARRY BARTELS, *et al.*,
*Appellees*.

**On Appeal from the United States District Court for the District of New Jersey**

## MOTION TO DISMISS OR AFFIRM

ROBERT L. CLIFFORD
MCELROY, DEUTSCH
& MULVANEY
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, N.J. 07962
(973) 993-8100

*Counsel for Appellee Larry Bartels*

ROBERT E. LEVY
NOMI LOWY
SCARINCI & HOLLENBECK
500 Plaza Drive
Secaucus, N.J. 07096
(201) 392-8900

PAUL M. SMITH *
SAM HIRSCH
KATHERINE A. FALLOW
KEVIN M. STACK
JENNER & BLOCK, LLC
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

LEON J. SOKOL
STEVEN SIEGEL
SOKOL, BEHOT & FIORENZO
433 Hackensack Avenue
Hackensack, N.J. 07601
(201) 488-1300

* Counsel of Record

*Counsel for Appellees Codey, Delgado, Giblin, Greenwald, Watson Coleman, and The New Jersey Apportionment Commission*

December 21, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## TABLE OF CONTENTS


PAGE

STATEMENT OF THE CASE ..... 2

A. Adoption of the Challenged Redistricting Plan ..... 2

B. The *Page v. Bartels* Litigation ..... 8

C. Disposition of Appellants' Claims ..... 9

REASONS TO DISMISS OR AFFIRM ..... 13

I. THIS APPEAL WAS NOT TIMELY FILED ... 13

II. THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY A TRIAL ON THE CLAIM THAT RACE PREDOMINATED OVER OTHER TRADITIONAL DISTRICTING PRINCIPLES IN THE COMMISSION'S ADOPTION OF THE NEW PLAN ..... 16

A. To Invalidate the State's Chosen Apportionment Plan, Appellants Must Satisfy a Heavy Burden ..... 16

B. Appellants Failed to Establish that Racial Considerations Predominated Over the Other Redistricting Principles Applied by the Commission in Adopting the New Plan ..... 17

**TABLE OF CONTENTS - continued**

C. The Evidence that the Commission Sought to Protect Minority Incumbents Does Not Suffice to Trigger Strict Scrutiny ..... 20

D. Summary Judgment Was Appropriate ..... 24

III. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIMS UNDER THE DOCTRINE OF *RES JUDICATA* ..... 25

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

**CASES** Page

*Bush v. Vera*, 517 U.S. 952 (1996) . . . . . 21, 22

*CoreStates Bank, N.A. v. Huls America, Inc.*, 176 F.3d 187 (3d Cir. 1999) . . . . . 26

*Costner v. URS Consultants, Inc.*, 153 F.3d 667 (8th Cir. 1998) . . . . . 27

*DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd in relevant part*, 515 U.S. 1170 (1995) . . . . . 21

*DeWitt v. Wilson*, 515 U.S. 1170 (1995) . . . . . 25

*EEOC v. United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990) . . . . . 26

*FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) . . . . . 15

*FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206 (1952) . . . . . 15

*Gaffney v. Cummings*, 412 U.S. 735 (1973) . . . . . 23

*Goldberg v. Cablevision Systems Corp.*, 261 F.3d 318 (2d Cir. 2001) . . . . . 14, 15

*Harrington v. Vandalia-Butler Board of Education*, 649 F.2d 434 (6th Cir. 1981) . . . . . 27

*Hunt v. Cromartie*, 121 S. Ct. 1452 (2001) . 16, 17, 20, 21

*Hunt v. Cromartie*, 526 U.S. 541 (1999) . . . . . 24

*King v. Illinois Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd*, 522 U.S. 1087 (1998) . . . . . 21

**TABLE OF AUTHORITIES - continued**

Page

*Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990) .... 26, 27

*Miller v. Johnson*, 515 U.S. 900 (1995) .... 17, 18, 22, 23

*Nevada v. United States*, 463 U.S. 110 (1983) ..... 26

*Northern Assurance Co. of America v. Square D Co.*, 201 F.3d 84 (2d Cir. 2000) ..... 27

*Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) ..... *passim*

*Richards v. Jefferson County*, 517 U.S. 793 (1996) ..... 28, 29

*Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998) ..... 26

*Shaw v. Hunt*, 517 U.S. 899 (1996) ..... 21

*Shaw v. Reno*, 509 U.S. 630 (1993) ..... 16, 19, 21

*Thornburg v. Gingles*, 478 U.S. 30 (1986) ..... 22

*Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996) ..... 29

*Ward v. Winstead*, 400 U.S. 1019 (1971) ..... 13, 16

**CONSTITUTION AND STATUTES**

28 U.S.C. § 2101(b) ..... 14, 15

N.J. Const. art. IV, § 3 ..... 3

## TABLE OF AUTHORITIES - continued

Page

### MISCELLANEOUS

Restatement (Second) of Judgments § 24 (1980) . . 26, 27

Mark Perkiss, *Bartels: Map Fair to Both Parties*, Trenton Times, Nov. 19 2001 . . . . . 6

IN THE

# Supreme Court of the United States

---

**No. 01-721**

**NORMAN M. ROBERTSON, *et al.*,**
***Appellants,***

**v.**

**LARRY BARTELS, *et al.*,**
***Appellees.***

---

**On Appeal from the United States District Court for the District of New Jersey**

---

## MOTION TO DISMISS OR AFFIRM

---

This appeal arises from the second of two cases that were filed last spring challenging a statewide legislative redistricting plan adopted by the New Jersey Apportionment Commission. In the first case, filed on behalf of all the Republican members of the New Jersey Legislature as well as various individual voters, a three-judge district court conducted a full trial, doing so on an expedited basis due to impending primary elections. It then rejected the plaintiffs' central claim that the legislative plan violated section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it lowered the percentages of African-American voters in three districts in the Newark area while adding some African-American population to a neighboring district, District 34. *See Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001). The *Page* court held that such unpacking was not harmful to the interests of African-Americans in light of the relatively high degree of white "crossover" voting in legislative elections in New Jersey. *Id.* at 364-65.

In this second case, filed a few days before the *Page* trial by two incumbent Republican legislators from District 34 and several other individuals, the plaintiffs did not invoke the Voting Rights Act or the rights of African-Americans. Instead, they relied primarily on this Court's *Shaw v. Reno* line of cases, claiming that the Apportionment Commission had acted with unconstitutional, predominantly racial motives when it chose to disperse African-American voters from three Newark-area districts into four, thus increasing the percentage of African-American voting-age residents in District 34 from 3.9% to 35.3%. The three-judge court granted summary judgment to the defendants, ruling that there was no evidence supporting the claim that race was a predominant factor, subordinating other traditional redistricting criteria, particularly given the undisputed evidence (1) that the Commission gave careful consideration to other criteria, (2) that the changes being challenged increased the *integration* of white and African-American New Jerseyans, and (3) that the challenged District 34 – far from being suspiciously irregular in shape – *was built entirely of whole towns*. J.S. App. 30a-32a.

This Court should either dismiss the appeal, if it agrees with appellees that the notice of appeal was untimely filed, or summarily affirm a ruling that was entirely correct on the merits.

## STATEMENT OF THE CASE

### A. Adoption of the Challenged Redistricting Plan.

The New Jersey Legislature consists of a State Senate with 40 members and a General Assembly with 80 members. The same districts are used for both bodies, with one Senator and two Assembly members elected in each district.

Pursuant to the New Jersey Constitution, an Apportionment Commission (hereinafter "the Commission") was appointed following the 2000 census. *See* N.J. Const. art. IV, § 3, ¶ 1. The Commission originally consisted of five Democrats and five Republicans, selected by the parties' state political chairs. When the Commission was unable to approve a new districting plan by majority vote, the Chief Justice of the New Jersey Supreme Court was constitutionally authorized to appoint an eleventh member, and she selected Larry M. Bartels, a professor of politics and public affairs at Princeton University.

The plan eventually supported by Professor Bartels was the product of extensive study, consultation, and negotiation with all ten original members of the Commission. Assisted by former New Jersey Supreme Court Justice Robert L. Clifford, Professor Bartels studied numerous competing plans and negotiated with both sides about his specific concerns with the proposed maps. In deciding which plan to select, Professor Bartels balanced a number of redistricting principles, including compactness, respect for political subdivisions, partisan fairness, responsiveness, avoidance of voter disruption (in other words, the ability of voters to support, or oppose, their current representatives), and compliance with the Constitution and section 2 of the Voting Rights Act. The factors taken into account by Professor Bartels are summarized in his certification provided to the district court in *Page v. Bartels*:

> 6. Based on Justice Clifford's advice, I understood that federal law prohibited any redistricting plan that gave minority voters less opportunity than non-minority voters to elect their preferred candidates to the New Jersey Legislature. Therefore, in the process of evaluating competing redistricting maps, I paid close attention to racial and ethnic data and electoral opportunities.

> 7. *However, those were not my sole considerations. I also paid close attention to several other criteria, including* (1) minimizing the population deviations among the districts, as required by the "one person, one vote" rule; (2) keeping each of the forty districts contiguous; (3) keeping each of the forty districts reasonably compact; (4) respecting municipal boundaries by not splitting any towns other than Newark and Jersey City (which are too large to fit in one legislative district); (5) respecting voting-district [precinct] boundaries; (6) avoiding any bias in the map that might favor one political party over the other in an election year when the two parties were tightly competitive; (7) ensuring that some seats were competitive so that the composition of the Legislature would be responsive to shifts in votes from one party to the other; and (8) minimizing voter disruption, so as not to deny too many New Jersey citizens the opportunity to vote for incumbents who had served them well or against incumbents who had not done so.

Bartels Cert. ¶¶ 6-7, J.S. App. 54a-55a (emphasis added).[1]

Chief among Professor Bartels' concerns in weighing the merits of the parties' competing plans were the issues of partisan bias and voter disruption. Indeed, these criteria were critical factors in convincing Professor Bartels to select the Democratic plan over the Republicans' proposal. As Professor Bartels explained at the *Page* trial, after he worked extensively with both sides to come up with a plan, both parties submitted versions that Professor Bartels felt "were generally similar" with respect to a number of redistricting issues, including minority representation. Tr. 374. Professor Bartels concluded, however, that the Democratic plan was superior on the issues of voter disruption and partisan bias, and as a result, he decided

---

[1] Professor Bartels' certification is reprinted at J.S. App. 52a-66a.

to vote for the Democratic plan. Professor Bartels testified as to the basis of his determination to vote for the final Democratic Plan:

> Q. Can you tell us why you decided at that point in time to come to cast a vote?
>
> A. Yes. Because the H-20 version [the Republican Plan] as I just tried to describe, seemed to me to be inferior to the plan that the Democrats had on the table. The revised version of H-20, when we analyzed that, turned out to be, I think, a significant step backward *especially with respect to partisan bias*. And I became convinced that it was quite unlikely that we would be able to end up with a satisfactory plan within the general framework proposed by [the] Republicans. At the same time, with the Democrats having accepted most of the concessions that we had suggested, it seemed to me that the Democratic map on the table was not only superior to all the other maps that we had seen up to that point, but also was quite satisfactory in absolute terms with respect to these various criteria.

Tr. 375 (emphasis added). Professor Bartels elaborated further on his decision:

> The criteria of voter disruption had to do with how many citizens would have an opportunity to vote for or against their current incumbents and so one of the things we calculated with respect to each of the proposals was an estimate of how many people would live in the same district with the three incumbents that they currently had, or with two of those incumbents, or with one of those incumbents. The calculation for the plan that was adopted was that 66 percent of the people in the state would have an opportunity to vote for or against the same three

> incumbents. The corresponding figure for the Republican plan, H-20 I believe, was in the neighborhood of 57 or 58 percent.
>
> The calculation with respect to partisan bias had to do with trying to figure out what the composition of the legislature would be in the case that voters across the state divided their votes evenly between candidates of the two parties. The criteria essentially was that in the case of a 50/50 vote, the composition of [the] legislature should be evenly divided between the two parties, and that as the voting pattern shifted away from 50/50 in either direction, the composition of the legislature should also shift correspondingly.

Tr. 376-78.[2]

The issue of minority representation focused almost exclusively on four districts. Under the 1991 apportionment plan, the City of Newark and several surrounding towns in Essex County were placed into three districts, Districts 27, 28, and 29. The voting-age population of these districts ranged from 48.2% to 57.4% African-American and from 68.6% to 79.1% combined "minorities." *Page*, 144 F. Supp. 2d 346, 352 n.8 (D.N.J. 2001). In legislative elections, the districts regularly gave 80% or more of their vote to Democratic candidates (most of whom were African-American). *Id.* at 361. Under the 1991 plan, District 34 consisted of nearby Passaic County towns, with predominantly Republican voters, and had

---

[2] As it turned out in the 2001 election, Professor Bartels' assessment of partisan fairness proved correct. For example, in Senate races, the statewide vote totals were very close, with Democratic candidates winning just a few votes more than Republican candidates. The New Jersey Senate is now evenly divided, 20 to 20. *See*, Mark Perkiss, *Bartels: Map Fair to Both Parties*, Trenton Times, Nov. 19, 2001, at A1.

an African-American voting-age population of 3.9%. *Id.* at 352-53 n.8.

Because of the demographics of Districts 27, 28 and 29, it was broadly perceived that some substantial change was required to achieve a more equitable allocation of both Democratic votes and minority votes, viewed from a statewide perspective. The plan offered by the Democrats, which was eventually adopted by Professor Bartels and the Commission, dispersed, or "unpacked," the heavily concentrated, Democratic-leaning minority populations in Districts 27, 28, and 29. As a result, the percentage of African-Americans decreased somewhat in Districts 28 and 29, decreased more significantly in District 27, and increased significantly in District 34. *Id.* Specifically, under the Democrats' proposed plan, several Essex County municipalities with large African-American populations were combined with several Passaic County towns with overwhelmingly white voting populations to create a new District 34 with an African-American population of 35.3%. *Id.* Under the competing plan proposed by the Republicans, Districts 27, 28, 29, and 34 would have retained roughly the same demographic makeup as in the 1991 plan, *id.* at 354, thus preventing the achievement of a fairer partisan balance in the map.

Having determined that the Republicans' plan was inferior on the issues of partisan bias and voter disruption, and having assured himself that the Democrats' plan gave minorities voting opportunities at least equal to those offered in the Republicans' plan, Professor Bartels concluded that the Democratic plan best met the various redistricting principles informing his decision. The Democratic plan (modified to meet several of Professor Bartels' concerns) was thus approved by a six-member majority, certified by the Commission on April 11, 2001, and filed with the Secretary of State on April 12, 2001.

**B. The *Page v. Bartels* Litigation.**

On April 12, 2001, the Republican members of the New Jersey Legislature, along with several registered voters, filed their complaint challenging the Commission's plan in *Page v. Bartels*, in the United States District Court for the District of New Jersey. As Republican legislators, appellants Robertson and Zecker were among the plaintiffs in the *Page* suit.[3] The *Page* complaint asserted four claims: (1) that the Commission's plan would dilute minority voting power and thus "infringe plaintiffs' rights as protected by § 2 of the Voting Rights Act of 1965"; (2) that the Commission intentionally violated section 2; (3) that in adopting the new plan the Commission violated the plaintiffs' rights to due process and equal protection under the Fourteenth Amendment; and (4) that the plan violated the Fifteenth Amendment. *See Page*, 144 F. Supp. 2d at 349-50.

Following resolution of procedural issues not relevant to this matter, a three-judge panel was appointed pursuant to 28 U.S.C. § 2284 to preside over the *Page* litigation. The panel consisted of Circuit Judge Leonard I. Garth and District Judges Dickinson R. Debevoise and Harold A. Ackerman. The panel convened a trial on all claims and defenses on April 30 and May 1, 2001. After receiving evidence and hearing testimony from both sides' witnesses and experts, the court rejected the plaintiffs' argument that section 2 required the Commission to adopt the Republican plan, which essentially retained the

---

[3] The plaintiffs listed in the *Page* complaint included "the State Senate Republican Majority" and the "Assembly Republican Majority." The complaint described the plaintiffs as including Republican "citizens of the State of New Jersey who have been duly elected as Senators/Assemblymen from previously constituted legislative districts and currently serve in the New Jersey Legislature and comprise the majority of each of the respective houses." *See* J.S. App. 7a n.1.

majority-minority Districts 27, 28, and 29 created under the 1991 plan. Concluding that the "dissolution of majority-minority districts does not constitute a *per se* violation of § 2," *Page*, 144 F. Supp. 2d at 363, the court looked at the totality of circumstances to determine whether the new plan violated section 2. Because the evidence did not show that voting in these districts was so racially polarized as to defeat minority voting strength, the court concluded that the reduction of the number of African-American voters in District 27 and the dispersal of African-American voters to other districts, including District 34, would not "impair or prevent minorities from electing their chosen representatives." *Id.* at 366.

The court also rejected the plaintiffs' constitutional claims. Of particular relevance to this case, the court in *Page* held that

> [r]ace *per se* was not the predominant motive in the approval of the Bartels plan. Rather, the Bartels plan was adopted based on a variety of factors, most notably the doctrine of political fairness, Constitutional and statutory requirements, and the concerns of minorities. Thus, we hold that the evidence is not sufficient to support a claim for violation of the Equal Protection Clause.

*Id.* at 368.

**C. Disposition of Appellants' Claims.**

This case was filed three days before the *Page* trial began. The complaint set forth two causes of action that are relevant here, described by the District Court as follows:

> first, that the proposed District 34 'was constituted with a race-based outcome as the predominant consideration to the subordination of traditional principles of redistricting' in violation of the Fourteenth and Fifteenth Amendments

> to the United States Constitution; [and] second, that the Commission engaged in purposeful unconstitutional racial discrimination by adopting a redistricting plan that favored certain incumbent minority legislators.

J.S. App. 8a (quoting plaintiffs' complaint).[4]

A new three-judge panel was appointed on May 7, 2001, consisting of two of the judges on the *Page* panel – Judges Ackerman and Debevoise – plus Circuit Judge Morton I. Greenberg. By agreement of the parties, the preliminary and permanent injunction proceedings were consolidated, and the trial record in *Page* was incorporated into the record on the plaintiffs' claims in this case. J.S. App. 9a.

Appellees moved for summary judgment. In their opposition to appellees' motion, appellants relied almost exclusively – as they do in this Court – on statements made in the *Page* litigation by Professor Bartels indicating that he considered minority voting opportunities along with other redistricting principles in selecting between the parties' competing maps. *See* J.S. at 5-6; J.S. App. 99a-100a.

In its June 13 order, the three-judge court granted summary judgment for appellees on two counts of appellants'

---

[4] In addition to Senator Robertson of District 34, plaintiffs were the mayors of Totowa and Little Falls, two Passaic County towns that were in former District 34 but would not be in new District 34, and the mayor of West Paterson, which was formerly in District 35 but would become part of District 34 under the new plan. The other plaintiffs were two individuals precluded from running for office in the new District 34 because of a state one-year residency requirement. These two individuals also asserted a challenge to the one-year residency requirement. That claim was referred by the panel to a single judge and is not before this Court. *See* J.S. App. 9a. Assemblyman Zecker, also of District 34, intervened a few days later.

complaint. In its June 18 opinion setting forth its reasoning, the court rejected appellants' claim of racial gerrymandering, concluding that appellants' reliance on Professor Bartels' isolated statements concerning minority voting opportunities ignored the full context of the decision made by Professor Bartels and the Commission. The court thus held that

> Bartels' certification and trial testimony in *Page* clearly establish that while race was a consideration in selecting a redistricting plan, *it was not the predominant factor.* Bartels acknowledges that he considered the racial composition of the new districts, including the electoral opportunities for minority candidates. But he considered many factors other than race. As the Court in *Shaw* recognized, mere consciousness of race in redistricting is an insufficient basis on which to trigger strict scrutiny where it is considered along with traditional redistricting principles, such as compactness, contiguity and political boundaries. *See Shaw*, 509 U.S. at 646, 113 S. Ct. at 2826. Here, there is clear evidence, not [refuted] by actual facts, that in addition to racial criteria, *Bartels considered traditional redistricting principles including equal population, contiguity, compactness, respect for municipal and voting-district [precinct] boundaries, the avoidance of partisan bias, competitive[ness] and responsiveness, and the minimization of voter disruption.*

J.S. App. 30a-31a (emphasis added).[5]

---

[5] The district court's original opinion contained a typographical error in the clause "not reflected by actual facts." *See* J.S. App. 31a. In an order dated June 26, 2001, the court substituted the correct word, so that the clause should read "not refuted by actual facts." *See* J.S. App. 44a.

For similar reasons, the District Court also rejected appellants' separate claim based on statements by Professor Bartels that he considered the effect of the proposed plan on the election prospects of minority *incumbents*. As with appellants' first claim, the District Court concluded that although these statements indicated that the Commission considered race in its decision to adopt the new plan, Professor Bartels and the Commission also considered protection of incumbents as a general matter, along with a host of other factors, and therefore race did not subordinate other traditional redistricting principles. J.S. App. 35a-36a.

The court further held, contrary to appellants' claims, that the boundaries of the Commission plan, and of District 34 in particular, "are hardly irregular or bizarre," and thus did not give rise to a *per se* presumption of racial gerrymandering. J.S. App. 31a. To the contrary, the plan consisted of reasonably compact districts and, consistent with state districting requirements, kept whole every municipality in the state (with the necessary exceptions of New Jersey's two largest cities, Newark and Jersey City). *Id.* The court specifically rejected appellants' argument that the creation of the new District 34 – combining predominantly white Passaic County towns with predominantly African-American Essex County towns – constituted racial gerrymandering. As the District Court noted, this kind of *integration* of voters in a district is the opposite of the kinds of districting decisions that led to this Court's *Shaw* line of cases. As the District Court observed, those cases reflect concerns about political line-drawing that *segregates* voters based on race. But those concerns, "while unquestionably legitimate, do not come into play under the Commission's plan. Indeed, the redistricting plan goes farther than traditional majority-minority redistricting plans in fighting these concerns by purposefully retaining geographically contiguous and compact boundaries at the expense of majority-minority racial composition." J.S. App. 34a.

In addition to rejecting appellants' constitutional claims on the merits, the district court granted summary judgment to appellees for the independent reason that appellants' claims were barred by the doctrine of *res judicata*, and in particular by the doctrine of virtual representation, because appellants' interests had been adequately represented by the plaintiffs in the *Page* litigation. J.S. App. 11a-21a. The court noted that as a member of the State Senate Republican Majority – the group that brought the *Page* suit – Senator Robertson was in essence a party to the *Page* litigation. J.S. App. 18a. The court found that Senator Robertson and his co-plaintiffs shared a common goal with the *Page* plaintiffs – to invalidate the redistricting plan proposed by the Democrats and to enforce a plan that maintained the boundaries of the old District 34 – and that the *Robertson* plaintiffs had engaged in tactical maneuvering to avoid adjudication of their claims by the *Page* panel. *Id.* Given the similar goals of the plaintiffs in *Page* and *Robertson*, and given the possibility that the redistricting plan raises issues of public law that could be subject to never-ending challenge if *res judicata* were not applied, the court determined that appellants would be considered in privity with the *Page* plaintiffs and that therefore their constitutional claims were barred by claim preclusion. J.S. App. 20a-21a.

## REASONS TO DISMISS OR AFFIRM

### I. THIS APPEAL WAS NOT TIMELY FILED.

Appellants failed to file their notice of appeal within 30 days of the District Court's order denying their applications for preliminary and permanent injunctions, as required for interlocutory appeals under 28 U.S.C. § 2101(b). As a result, this appeal must be dismissed. *See Ward v. Winstead*, 400 U.S. 1019 (1971) (summarily dismissing appeal where notice of appeal not timely filed pursuant to 28 U.S.C. § 2101(b)).

Because of the expedited nature of this case, the District Court issued an order addressing appellants' challenges to the New Jersey districting plan before it issued a full opinion. That order, filed on June 13, 2001, (1) denied appellants' application for preliminary and permanent injunctions, (2) granted appellees' motion for summary judgment on counts one and two of the complaint, and (3) referred count three of the complaint to a single judge for disposition. *See* J.S. App. 46a-47a; *see also supra note* 4. On June 18, the District Court issued its opinion "setting forth its reasons" for its June 13 order. *See* J.S. App. 9a. On June 26, the District Court issued an order changing one word in its June 18 opinion. *See* J.S. App. 44a (changing "reflected" to "refuted").

Appellants did not file their notice of appeal until July 26, 2001, thirty days after the order amending the June 18 opinion. That notice stated that appellants were appealing from the June 13 order "entered pursuant" to the June 18 opinion and June 26 corrective order. *See* J.S. App. 50a. That filing was too late, for two reasons. First, the applicable time limit was the 30-day limit for appeals from "interlocutory" orders. Second, the running of the 30 days was not triggered anew simply because the District Court corrected one word of its opinion on June 26.

Section 2101(b) provides that direct appeals to the Supreme Court authorized by law "from a decision of a district court . . . shall be taken within thirty days from the . . . order . . . appealed from, if interlocutory, and within sixty days if final." 28 U.S.C. § 2101(b). Here the order appealed from is clearly interlocutory. The District Court granted summary judgment on two counts of the complaint, denied appellants' request for injunctive relief arising from those two counts, and expressly referred the third count for disposition by a single-judge court. *See* J.S. App. 46a-47a. Because one of appellants' claims remained undecided, the District Court's order is "interlocutory." *See, e.g., Goldberg v. Cablevision*

*Systems Corp.*, 261 F.3d 318, 324 (2d Cir. 2001) (holding that grant of summary judgment that left claims to be decided was "interlocutory" under 28 U.S.C. § 1292(a)(1)). As a result, under section 2101(b), appellants were required to file their notice of appeal within 30 days of the District Court's June 13, 2001 order.

Appellants failed to do so. Appellants did not file their notice of appeal until 43 days later, on July 26, 2001. *See* J.S. App. 43a. There can be no argument that appellants' notice of appeal was timely because it was filed within thirty days of the District Court's June 26 order correcting one word in its June 18 opinion. Here the "order . . . appealed from," 28 U.S.C. § 2101(b), is the District Court's order granting defendants' motion for summary judgment on two of the three counts of the complaint and denying plaintiffs' application for injunctive relief – its June 13 order – not its June 26 order correcting a typo. Even if the "order . . . appealed from" were the District Court's June 18 opinion setting forth its reasons for its June 13 order – which it clearly is not – appellants' notice of appeal would be untimely. The mere fact that an order "previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought." *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952). The "question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality." *Id.* at 212; *see FCC v. League of Women Voters of Calif.*, 468 U.S. 364, 373 n.10 (1984) (referring to *Minneapolis-Honeywell*'s immaterial-revision test). The District Court's June 26 order correcting a single typo in its opinion comes nowhere close to meeting the test of revising the legal rights and obligations that were clearly established by its June 13 order.

Because appellants filed their notice of appeal more than 30 days after the District Court's June 13, 2001 order, their appeal is untimely and must be dismissed. *See Winstead*, 400 U.S. at 1019.

## II. THE DISTRICT COURT CORRECTLY HELD THAT THERE WAS INSUFFICIENT EVIDENCE TO JUSTIFY A TRIAL ON THE CLAIM THAT RACE PREDOMINATED OVER OTHER TRADITIONAL DISTRICTING PRINCIPLES IN THE COMMISSION'S ADOPTION OF THE NEW PLAN.

### A. To Invalidate the State's Chosen Apportionment Plan, Appellants Must Satisfy a Heavy Burden.

Because appellants challenge the lines drawn by the Commission as impermissibly race-based, they face a "'demanding'" burden of proof. *Hunt v. Cromartie*, 121 S. Ct. 1452, 1458 (2001) ("*Cromartie II*") (quoting *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O'Connor, J., concurring)). They must show that the district lines "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 649 (1993) ("*Shaw I*"). This Court "has specified that those who claim that a legislature has improperly used race as a criterion, in order, for example, to create a majority-minority district, must show at a minimum that the 'legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'" *Cromartie II*, 121 S. Ct. at 1458 (quoting *Miller*, 515 U.S. at 916). "Race must not simply have been '*a* motivation for the drawing of a majority minority district.'" *Id.* (quoting *Bush v. Vera*, 517 U.S. 952, 959 (1996) (O'Connor, J., principal opinion)). It must be the "predominant factor." *Id.* (citations omitted).

Further, appellants must overcome the significant deference afforded to state decisions about redistricting. The State "'must have discretion to exercise the political judgment necessary to balance competing interests,' and courts must 'exercise *extraordinary caution* in adjudicating claims that a State has drawn district lines on the basis of race.'" *Id.* (quoting *Miller*, 515 U.S. at 916 (emphasis added)). Moreover, "[t]he courts, in assessing the sufficiency of a challenge to a redistricting plan, must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). That same sensitivity is also owed to a plan that is a product of a state commission established for this purpose under a state's constitution.

### B. Appellants Failed to Establish that Racial Considerations Predominated Over the Other Redistricting Principles Applied by the Commission in Adopting the New Plan.

As the District Court correctly held, appellants made no showing that they could meet their "demanding" burden of proving that race so predominated in the Commission's adoption of the new plan as to justify judicial invalidation of the State's decision about how to apportion its legislative districts. Appellants point to Professor Bartels' statements that "in the process of evaluating competing redistricting maps, [he] paid close attention to racial and ethnic and electoral opportunities," Bartels Cert. ¶ 6, J.S. App. 54a-55a, that he "was determined to examine possibilities for expanding minority representation," *id.* ¶ 12, J.S. App. 57a-58a, and that he believed that the Democratic plan was "superior to GOP-H20 (or any other plan proposed by the Republicans) in terms of creating *new* opportunities for minority candidates to win seats in the Legislature." *Id.* As the District Court observed, however, these statements cannot be considered in isolation.

J.S. App. 26a. Viewed in the context of the Commission's entire decisionmaking process, the District Court concluded, these statements could not support the conclusion that race was anything more than one among many of the Commission's considerations.

In so doing, the court relied on unrebutted statements in Professor Bartels' sworn certification and trial testimony. The court noted that Professor Bartels elaborated in his certification on the effects of other criteria, including population equality, compactness, preservation of municipal boundaries, and, above all, avoiding partisan bias and voter disruption. Appellants offered no evidence to counter any of these assertions. It was thus undisputed, on this record, that Professor Bartels and the Commission applied a multiplicity of criteria in determining which plan to adopt, not limited to or predominated by racial criteria. Indeed, the panel in *Page* found that "all of the witnesses who testified about the apportionment process confirmed that Professor Bartels set out several criteria with which he was concerned, and his criticisms of each party's maps were not race-based." 144 F. Supp. 2d at 368. The court in *Page* thus held that "[r]ace *per se* was not the predominant motive in the approval of the [Commission's] plan." *Id.* Instead, the record unequivocally shows that the Commission's decision was based on a "complex interplay of forces" to which deference is owed. *Miller*, 515 U.S. at 915-16.

That racial considerations did not predominate in the drawing of the Commission plan as a whole, and new District 34 in particular, is reinforced by the fact that District 34 is compact and reasonably shaped. J.S. App. 32a. Although irregular shape is not a prerequisite to establishing a racial gerrymander, evidence as to the shape of a district is an indication whether the district was drawn merely to separate voters on the basis of race, or instead to satisfy a number of redistricting principles. *See Miller*, 515 U.S. at 913.

Appellants do not argue that District 34's boundaries are especially irregular; in fact, appellants concede that District 34, like all the districts in the new plan, does "not appear to violate the New Jersey constitutional requirements of contiguity, compactness and respect for municipal boundaries." J.S. at 8. This concession reflects the fact that District 34 consists entirely of five whole towns. This simply is not a case in which the Commission ignored traditional districting principles of compactness and contiguity and drew bizarre boundaries so as to sweep as many voters of one race as possible within one district. *See Shaw I*, 509 U.S. at 647. Quite the opposite is true: as the District Court observed, the plan "purposefully retain[s] geographically contiguous and compact boundaries at the expense of a majority-minority racial composition." J.S. App. 34a.

Appellants nonetheless suggest that race predominated in the Commission's drawing of District 34 because the new district combines heavily African-American towns like East Orange with towns "with which East Orange has little in common racially, demographically, socially or economically," and because three contiguous towns (the mayors of which are appellants in this case) will be in different legislative districts. J.S. at 9. That argument is incorrect for several reasons. First, it reflects an assumption that any change to the existing district configuration is constitutionally suspect and requires a strong justification. But there is no factual or legal support for that assumption. (In any event, as the District Court noted, the three towns represented by the appellant mayors were not all in the same legislative district even under the 1991 plan. J.S. App. 32a n.13.) Reapportionment necessarily involves change to district lines, and where, as here, the Commission adhered to New Jersey's redistricting principles of compactness, contiguity, respect for municipal lines, and the like, the fact that some districts may have a different municipal and demographic makeup does not create a cause of action.

Moreover, the changes to District 34 had the effect of integrating predominantly white communities with predominantly African-American communities, and they were undertaken in large part to increase the partisan balance in the map. As the District Court stated, such integration is fundamentally different from the concern that is at the heart of *Shaw*: the creation of districts based on the belief that voters of one race always have the same interests and cannot reach across racial lines to form other types of political coalitions. J.S. App. 33a-34a (citing *Shaw*, 509 U.S. at 647-48).

Furthermore, when, as here, racial identification correlates closely with political affiliation, the burden on a party challenging a districting plan under the *Shaw* doctrine is especially high. *See Cromartie II*, 121 S. Ct. at 1465. Here, the record discloses that African-Americans in Essex County overwhelmingly vote in favor of Democratic candidates. Thus, under the principles recognized by this Court in *Cromartie II*, appellants must establish that (1) "the [districting authority] could have achieved its legislative political objectives in alternative ways that are comparably consistent with traditional districting principles"; and (2) the "districting alternatives [put forth by the challenger] would have brought about significantly greater racial balance." *Id.* at 1466. The mere recitation of these standards enunciated by this Court in *Cromartie II* conclusively establishes the untenability of appellants' case, in light of the fact that *it is appellee's plan as adopted*, and not any alternative offered by appellants, that "[brings] about significantly greater racial balance." *Id.*

### C. The Evidence that the Commission Sought to Protect Minority Incumbents Does Not Suffice to Trigger Strict Scrutiny.

Appellants' case is not materially aided by their separate argument that the Commission engaged in racial discrimination

in its treatment of incumbent legislators. This argument is premised primarily on a statement in Professor Bartels' certification that he was "determined not to adopt any plan that would significantly threaten the reelection chances of incumbent minority legislators." Bartels Cert. ¶ 12, J.S. App. 57a-58a. Appellants argue that the Professor's failure to demand the same protection for every non-minority incumbent (including the two appellant former legislators) constitutes disparate treatment. They further claim that, as to this specific form of alleged racial discrimination, the "predominant motive" test no longer applies and they can invoke strict scrutiny by pointing to evidence of *any* consideration of the race of incumbents.

This argument is flawed in many ways. To begin with, as already noted, this Court has repeatedly explained that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race." *Bush v. Vera*, 517 U.S. 952, 958 (1996) (O'Connor, J., principal opinion); *see also Cromartie II*, 121 S. Ct. at 1458; *Miller v. Johnson*, 515 U.S. at 916; *Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("*Shaw II*"); *Shaw I*, 509 U.S. at 646; *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *summarily aff'd in relevant part*, 515 U.S. 1170 (1995).[6] To the contrary, even where there is evidence that a state was aware of race when it created an apportionment map, to invalidate that map "a plaintiff must prove that the legislature subordinated traditional race-neutral districting

---

[6] As they did in the District Court, appellants assume that strict scrutiny applies, and devote much of their argument to the presence or absence of a compelling state interest for the Commission's decision, relying on *King v. Illinois Board of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd*, 522 U.S. 1087 (1998). But as the District Court noted, the *King* case on which appellants rely was on remand from this Court's determination that plaintiffs had stated a racial gerrymandering claim, and is thus inapposite to the district court's holding in this case that appellants have failed to establish a racial gerrymander. J.S. App. 25a n.10.

principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller*, 515 U.S. at 916; *see also Bush v. Vera*, 517 U.S. at 958 (summary affirmance in *DeWitt* stands for the proposition that "strict scrutiny did not apply to an intentionally created *compact* majority-minority district") (O'Connor, J., principal opinion) (emphasis added).

There is no reason to abandon that standard merely because of a handful of statements in the record indicating an awareness of the race of incumbents, rather than just the race of voters. To begin with, the two cannot be so neatly separated. In the real world, a permissible effort to protect or enhance a minority group's electoral influence will often be described as an effort to protect or enhance the group's representation in the legislative body. But the *substance* of what is occurring will be the same.

It would be particularly unjustifiable in this case to create a rule triggering strict scrutiny based on evidence of *any* consideration of the race of incumbents. First, the Commission was engaged in an effort to relieve the undue "packing" of African-Americans and Democrats into three districts in the Newark area. That packing, the record shows, had the effect of diluting the influence of minority voters and Democratic voters statewide. In the course of addressing such a problem, however, one would naturally want to be sure that the dispersal of minority voters did not prevent the continued election of incumbents who had proved to be the candidates of choice of the minority voters in the previously packed districts. Indeed, such a concern amounts to a litmus test for when salutary unpacking turns into undesirable and unfair fragmentation of minority voters. *See Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

Second, it is undisputed that under the prior redistricting map, African-Americans were underrepresented in the New Jersey Senate, as compared to their share of the eligible population of voters. While proportional representation is not a constitutional or statutory right of minority voters, there is nothing inherently suspect about affirmative efforts to increase representation for a group that historically has been, and today continues to be, underrepresented, as long as that effort does not require subordination of other traditional and legitimate redistricting criteria. *See Miller*, 515 U.S. at 916; *cf. Gaffney v. Cummings*, 412 U.S. 735, 752-54 (1973) (Constitution permits deliberate efforts to produce political proportional representation).

Certainly there can be no argument that the District Court was required to view minority incumbent protection as a *predominant* factor in this case. After all, Professor Bartels weighed the reelection prospects of *all* incumbents in determining which plan to select. *See* Bartels Cert. ¶¶ 7, 21, J.S. App. 55a, 62a-63a. Professor Bartels believed that it was desirable "that as many New Jerseyans as possible be able to maintain – or choose not to maintain – their existing relationships with incumbent legislators." *Id.* ¶ 21, J.S. App. 62a-63a. He acknowledged that "[t]his goal conflicted, to some degree, with the goals of creating a fair, unbiased, and responsive map and building new opportunities for minority representation," but he believed that the plan ultimately adopted by the Commission "does a good job of minimizing voter disruption while satisfying other criteria." *Id.*

The District Court held that those statements, taken together, showed that although the Commission considered race when it considered minority incumbents' reelection prospects, it also considered protection of incumbents as a general matter, along with a host of other factors, and that therefore race did not subordinate other traditional redistricting

principles. J.S. App. 35a-36a. As the District Court observed, one consequence of dispersing minority voters into a larger number of districts "was that the chances for the reelection of the incumbents in those previously predominantly white districts was lessened, but this circumstance does not mean that the race of the incumbent was the predominant factor of the Commission's consideration." J.S. App. 36a. Recognizing that the Voting Rights Act "makes race a relevant factor to be considered," the court observed that "strict scrutiny is not triggered necessarily where [race] is utilized," but rather race must predominate over other traditional redistricting principles before strict scrutiny will apply. *Id.*

**D. Summary Judgment Was Appropriate.**

In a last-ditch effort to keep their claims alive, appellants argue that summary judgment on their constitutional claims was inappropriate, citing *Cromartie I.* J.S. at 21. In *Cromartie I*, however, the District Court granted summary judgment based solely on circumstantial evidence regarding the legislature's motive, and this Court remanded the case for the District Court to develop the factual record on whether race predominated in the legislature's redistricting decision. *Hunt v. Cromartie*, 526 U.S. 541, 547-48 (1999). In this case, by contrast, the parties explicitly agreed that the entire record from the *Page* litigation, including extensive testimonial evidence, would be incorporated into the record for summary judgment. J.S. App. 9a. As a result, unlike in *Cromartie*, the evidence included oral and written testimony by the individual casting the deciding vote to approve the new districting plan. In his certification and trial testimony, Professor Bartels elaborated on the criteria on which he had based his vote, and the interplay between those criteria. It is also worth noting that two of the judges on the *Page* panel, which observed witnesses and weighed evidence, were on the *Robertson* panel, and both panels ruled unanimously. Indeed, having heard and weighed

the evidence, the *Page* panel determined that "[r]ace *per se* was not the predominant motive in the approval of the Bartels plan. Rather, the Bartels plan was adopted based on a variety of factors, most notably the doctrine of political fairness, Constitutional and statutory requirements, and the concerns of minorities." *Page*, 144 F. Supp. 2d at 368. Likewise, based on the same substantial body of evidence, the *Robertson* panel concluded that appellants could not meet their burden of demonstrating that race subordinated other traditional redistricting principles in the Commission's decision, and that therefore summary judgment was proper. That decision was plainly correct and should be affirmed. *See DeWitt v. Wilson*, 515 U.S. 1170 (1995) (summarily affirming district court's grant of summary judgment where race did not predominate over redistricting authority's application of traditional redistricting principles).

## III. THE DISTRICT COURT PROPERLY DISMISSED APPELLANTS' CLAIMS UNDER THE DOCTRINE OF *RES JUDICATA*.

Appellants initiated this lawsuit with precisely the same objectives as the plaintiffs in the *Page* litigation – to overturn the plan adopted by the Commission and restore a Republican-leaning, predominantly white District 34. In fact, two of the appellants, Senator Robertson and Assemblyman Zecker, were parties in *Page* since all Republican members of the State Senate and the Assembly were named collectively as *Page* plaintiffs. Appellants nevertheless made the deliberate, tactical decision prior to the trial in *Page* to file their own complaint rather than argue their legal theory in *Page*. The District Court correctly held that *res judicata* barred appellants from bypassing their opportunity to raise those claims in *Page* and from bringing a separate suit challenging the Commission's plan.

The application of *res judicata* (also called claim preclusion) here follows well-established principles. *Res judicata* applies when there is a showing that there has been "(1) a final judgment on the merits of a prior suit involving (2) the same claim and (3) the same parties or their privies." *EEOC v. United States Steel Corp.*, 921 F.2d 489, 493 (3d Cir. 1990); *see Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998). There is no dispute that the panel's ruling in *Page* was a final disposition on the merits and therefore satisfies the first element.

As to the similarity of claims at issue in the two cases, the District Court followed settled law that the inquiry is "whether there is an 'essential similarity of the underlying events giving rise to various legal claims.'" *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187, 194 (3d Cir. 1999) (quoting *United States v. Atholone Indus.*, 746 F.3d 977, 984 (3d Cir. 1984)); *see, e.g.*, Restatement (Second) of Judgments § 24 cmt. a (1980) ("The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, that may be available to plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights."); *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983) (noting "transaction" approach of Second Restatement); *Lane v. Peterson*, 899 F.2d 737, 742 (8th Cir. 1990) (claim is generally barred by *res judicata* if it arises out of the same nucleus of operative facts as prior claim).

Here there is no doubt that the claims in this suit and those in *Page* arose from the same event: the Commission's adoption of a redistricting map. The plaintiffs in both these cases sought exactly the same relief: a declaration that the plan was unlawful, and restoration of a district resembling the former District 34. The District Court correctly concluded that,

in view of these facts, the differences in the legal theories propounded by the plaintiffs were of no consequence. J.S. App. 12a; *see, e.g., Harrington v. Vandalia-Butter Bd. of Educ.*, 649 F.2d 434, 437 (6th Cir. 1981) ("a judgment on the merits operates as a bar to the later suit, even though a different legal theory of recovery is advanced in the second suit") (internal quotation marks and citation omitted); *Northern Assurance Co. of Am. v. Square D Co.*, 201 F.3d 84, 87 (2d Cir. 2000); *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 674 (8th Cir. 1998); Restatement (Second) of Judgments § 24 cmt. c ("That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims.").

Moreover, the fact that appellants' theories could require presentation of some evidence not offered in *Page* also does not remove them from the preclusive effect of *Page*. The "transactional" approach to *res judicata* "contemplates that there may be some variance in the proof required for claims that are nonetheless the 'same claim' for *res judicata* purposes." *Lane*, 899 F.2d at 743. The operative question in each case is whether "the claims arise out of the same nucleus of facts." *Id.* The claims here not only arose out of the same operative facts but also sought the same relief, so the District Court was clearly correct in treating them as indistinguishable.

Finally, the District Court also was correct in rejecting the argument that *res judicata* should not apply because appellants purportedly were not parties in *Page*. To begin with, two of the appellants – Senator Robertson and Assemblyman Zecker – were in fact named as parties in *Page*, as the *Page* plaintiffs included all Republican members of the State Senate and the Assembly, named collectively. If appellants did not want to be bound by that case, they should at a minimum have asked that the appearance on their behalf be withdrawn before judgment.

Moreover, this Court has recognized that privity may apply when "a person, although not a party, has his interests adequately represented by someone with the same interests." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). Whether the relationship between the nonparty and the party to the prior adjudication is sufficiently close to justify preclusion on the grounds of adequate or virtual representation depends on several different considerations. As the District Court determined, the inquiry turns on the identity of interests between the two parties, the extent of participation in the prior litigation, apparent acquiescence, whether the present party maneuvered to avoid the effects of the first action, the adequacy of the prior representation (in terms of incentives to litigate), and whether a public or private law issue is raised. *See* J.S. App. 15a-17a (citing *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996); *Mann v. City of Albany*, 883 F.2d 999, 1003 (11th Cir. 1989); and *Richards*, 517 U.S. at 803).

These considerations support the District Court's finding of adequate or virtual representation here. As to identity of interests, the District Court correctly recognized that the *Page* plaintiffs and appellants shared an interest in restoring the old configuration of districts in the Newark area, which would have produced one more Republican-leaning district. As a result of that shared interest, there was "a clear commonality of interest among all the parties: their challenge to the validity of the New Jersey redistricting plan." J.S. App. 18a.

Moreover, to decline to apply *res judicata* here would reward appellants' tactical maneuvering. Appellants were not strangers to the *Page* litigation. *Cf. Richards*, 517 U.S. at 798. Not only were all Republican legislators named as plaintiffs there, but appellants also made a deliberate choice to initiate this separate lawsuit as opposed to participating actively in *Page*. Appellants state that they brought their separate complaint "when it became apparent that certain issues would

not be addressed in the *Page* case." J.S. at 23. But there was no inevitability concerning which issues would or would not be addressed in *Page* at the time appellants initiated this suit. Had Senator Robertson and Assemblyman Zecker spoken with their attorney in *Page*, they presumably could have assured that the legal theories they propound were given a hearing. Appellants provide *no* justification for not participating more actively in *Page*; they chose to sit it out and initiate a separate challenge to the plan. In these circumstances, the District Court was clearly correct to conclude that appellants engaged in tactical maneuvering, and to allow the lawsuit would directly contravene the grounds for the preclusion doctrines. *See* J.S. App. 19a. Here, as the District Court recognized, "'[h]olding preclusion inapplicable assures that a party would not intervene, for it would allow various members of a coordinated group to bring separate lawsuits in the hope that one member of the group would eventually be successful, benefitting the entire group.'" *Id.* (quoting *Tyus*, 93 F.3d at 457).

As to the adequacy of representation, the critical issue is whether the prior party had adequate incentive to litigate. *See, e.g.*, *Tyus*, 93 F.3d at 455-56. The *Page* plaintiffs had every incentive to litigate the validity of New Jersey's redistricting plan and to raise every possible avenue of attack that they believed might succeed. Moreover, as the District Court found, "experienced and competent counsel" represented the *Page* plaintiffs. J.S. App. 19a. The fact that appellants framed their challenge to New Jersey's redistricting plan under a different legal theory does not change these facts.

The District Court also noted that this case raises issues of public law. Where the issue of public law has only an indirect effect on a private party's interest, this Court has granted lower courts "wide latitude to establish procedures . . . to limit the number of judicial proceedings." *Richards*, 517 U.S. at 803. A large number of plaintiffs potentially have standing to

challenge the composition of New Jersey's legislative districts. If the court were not allowed to enforce the preclusion doctrine, it could be faced with one challenge after another, each asserting a different legal theory to obtain the same relief. The District Court correctly concluded that the public-law character of the issues at stake weighed in favor of preclusion.

Appellants' argument that the application of *res judicata* has the effect of imposing an unfairly short "statute of limitations" on redistricting actions makes no sense. The application of *res judicata* here provides an incentive to intervene for those who are on the sidelines as their political leaders litigate a challenge to a redistricting plan, so that different legal theories may be considered in a single proceeding, as opposed to seriatim. By choosing to intervene in such a suit, a party may alter the range of issues and legal theories that the court must decide. There is no unfairness in holding appellants to the results of the litigation that they consciously chose not to join. The application of *res judicata* here follows from settled principles; it prevents rewarding plaintiffs for self-consciously staying on the sidelines and initiating a separate proceeding to air their claims. The District Court's decision that *Page* bars this suit should be affirmed.

## CONCLUSION

This appeal should be dismissed as untimely or the judgment below should be summarily affirmed.

Respectfully submitted,

Robert L. Clifford
McElroy, Deutsch & Mulvaney
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, N.J. 07962
(973) 993-8100

*Counsel for Appellee Larry Bartels*

Paul M. Smith*
Sam Hirsch
Katherine A. Fallow
Kevin M. Stack
601 Thirteenth Street, N.W.
Jenner & Block, LLC
Washington, D.C. 20005
(202) 639-6000

Robert E. Levy
Nomi Lowy
Scarinci & Hollenbeck
500 Plaza Drive
Secaucus, N.J. 07096
(201) 392-8900

Leon J. Sokol
Steven Siegel
Sokol, Behot & Fiorenzo
433 Hackensack Avenue
Hackensack, N.J. 07601
(201) 488-1300

*Counsel of Record

*Counsel for Appellees Codey, Delgado, Giblin, Greenwald, Watson Coleman, and The New Jersey Apportionment Commission*

December 21, 2001

Supreme Court, U.S.
FILED
NOV 4 2002
CLERK

In The
# Supreme Court of the United States

OCTOBER TERM, 2001

**No.: 01-721**

NORMAN M. ROBERTSON, et als.

Appellants,

v.

LARRY BARTELS, et als.

Appellees.

**On Appeal from the United States District Court for the District of New Jersey**

## BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

**NORMAN M. ROBERTSON**
Suite 102B
Overlook at Great Notch
150 Clove Road
Little Falls, NJ 07424
(201) 709-1390
**Appearing Pro Se**

**JAMES A. ROBERTSON**
Kalison, McBride, Jackson
& Murphy, P.A.
645 Martinsville Road
Liberty Corner, NJ 07938
(908) 647-4600
**Attorneys for Appellants**
Coiro, Colletti, Gonzalez,
Kulick, Schwartz and Zecker

## TABLE OF CONTENTS

PAGE

I. THE RECORD SHOWS THAT INCUMBENTS WERE CLASSIFIED BY RACE AND SUBJECTED TO RACIAL DISCRIMINATION IN A REDISTRICTING PLAN WHICH WAS NOT NARROWLY TAILORED TO MEET A COMPELLING STATE INTEREST. . . . . 2

A. Direct Evidence of Racial Classifications. . . . . 2

B. The Absence of a Compelling State Interest Has Already Been Established. . . . . 4

C. The Redistricting Plan is not Narrowly Tailored. . . . . 6

II. APPELLEES AND THE COURT BELOW MISAPPLY THE "PREDOMINANT FACTOR" TEST. . . . . 6

III. THE APPEAL HEREIN WAS TIMELY FILED. . . . 7

IV. *RES JUDICATA* PRECLUSION IS WHOLLY INAPPROPRIATE. . . . . 9

CONCLUSION . . . . . 10

## TABLE OF CITED AUTHORITIES

### CASES

**Page**

*Brown v. Bd. of Education*, 347 U.S. 483 (1954) . . . . . 7

*Bush v. Vera*, 517 U.S. 952 (1996) . . . . . 2, 4, 5, 6

*City of Richmond v. J. A. Crosson Co.*, 488 U. S. 468 (1989) . . . . . 4, 5

*Karcher v. Daggett*, 462 U.S. 725 (1983) . . . . . 2

*King v. State Bd. of Elections*, 979 F.Supp. 619 (N.D. Ill. 1997), *aff'd* 522 U.S. 1087 (1998) (*King II*) . . . 5

*Loving v. Virginia*, 388 U.S. 1 (1967) . . . . . 4

*McLaughlin v. Florida*, 379 U.S. 184 (1964) . . . . . 4

*Miller v. Johnson*, 515 U.S. 900 (1995) . . . . . 4, 6

*Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) . . . . . 5, 9-10

*Palmore v. Sidoti*, 466 U.S. 429 (1984) . . . . . 4

*Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) . . . . . 4

*Shaw v. Hunt*, 517 U.S. 899 (1996) . . . . . 6

*Shaw v. Reno*, 509 U.S. 630 (1993) . . . . . .4, 6, 7

*Thornberg v. Gingles,* 478 U.S. 30 (1986) . . . . . 5

*Wygant v. Jackson Bd. of Educ.,* 476 U.S. 467 (1986) . . . 4

**STATUTES**

28 U.S.C. sec. 1253 . . . . . 8

28 U.S.C. sec. 2101 (b) . . . . . 7-8

28 U.S.C. sec. 2284 (a) . . . . . 8

Voting Rights Act, 42 U.S.C. sec. 1972 et seq. *passim*

42 U.S.C. sec. 1973 (b) . . . . . 5

**FEDERAL RULES OF CIVIL PROCEDURE**

Rule 24 . . . . . 10

Rule 42 . . . . . 10

In The
# Supreme Court of the United States

OCTOBER TERM, 2001

**No.: 01-721**

NORMAN M. ROBERTSON, et als.

Appellants,

v.

LARRY BARTELS, et als.

Appellees.

**On Appeal from the United States District Court for the District of New Jersey**

## BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

The New Jersey Apportionment Commission classified incumbent legislators and certain other candidates by race. These classifications were used to formulate a redistricting plan that, regardless of party affiliation, discriminated in favor of some incumbents and candidates and against others according to their race. Incumbents and voters alike have been adversely affected by this discrimination.

No basis exists to dismiss this appeal or to summarily affirm the errant holding of the lower court. In fact, the record

before this Court is sufficiently undisputed as to allow the Court to enter a summary reversal of the ruling below.

## I. THE RECORD SHOWS THAT INCUMBENTS WERE CLASSIFIED BY RACE AND SUBJECTED TO RACIAL DISCRIMINATION IN A REDISTRICTING PLAN WHICH WAS NOT NARROWLY TAILORED TO MEET A COMPELLING STATE INTEREST.

### A. Direct Evidence of Racial Classifications.

Consciousness of the race of voting populations is sometimes necessary to the configuration of new legislative districts. However, consciousness of the race of specific incumbents and candidates is not.

New Jersey's incumbent legislators were classified by race without regard to their party affiliation. Those incumbents considered members of minority groups were placed in electorally "safe" districts. Non-minority incumbents were not afforded the same consideration.[1]

This policy had its greatest impact on the incumbents and voters in District 34. The Apportionment Commission, went to great lengths to assure the electoral success of racially preferred candidates. Two of the six towns in the district were sent to District 40 in order to provide a safe seat for incumbent Republican Assemblyman Kevin O'Toole because his mother is Korean.[2] Further room was made in district 34 so that two

---

[1] The Supreme Court has permitted incumbent protection as a legitimate state goal in the redistricting process. *See, e.g., Bush v. Vera*, 517 U.S. 952, 964 (1996); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). The constitutional problem arises when such protection is given or withheld on the basis of the race of the incumbent.

[2] It should be noted that the District 40 incumbent Assemblyman displaced by this move was also Republican and was the longest serving member of the New Jersey General Assembly. Assemblyman Nicholas Felice was

towns with large African-American populations could help transform the district into a Democratic stronghold in order to facilitate the election of two African-American legislators. At one point, the pivotal Eleventh Member even had his attorney telephone three African-American incumbents in order to obtain their assurance that they could win their contests.[3]

Direct evidence of the Commission's commitment to this policy is already a part of the record before this Court.

> I considered the incumbency of current members of the legislature to be relevant with respect to *minority representation*, partisan balance, and minimizing voter disruption. *The plan adopted by the commission, NJ2001 . . . does not seem to me to pose any significant threats to minority representation . . . .*

Certification of Professor Larry Bartels, J.S. App. at 63a (emphasis added).

The Apportionment Commission was properly anxious to insure that minority voters were not disadvantaged in a way that violated the Voting Rights Act. The constitutional problem arose when they went beyond the Act's requirements to examine and act upon the race of individual incumbents and candidates. The record of intent is clear and undisputed.

> African-Americans, Hispanics, and other racial and ethnic minority groups protected by the Voting Rights Act and the federal Constitution are not currently represented in the New Jersey Legislature in proportion to their statewide population. I was therefore determined not to adopt any plan that

---

placed in a strong Democratic district and he was unable to win re-election. Assemblyman Felice's mother is Italian.

[3] The three African-American incumbents contacted were those who were expected to run against the incumbent 34th District legislators. The result was predictable. All three of the non-minority legislators, including appellants Senator Robertson and Assemblyman Zecker were defeated by large margins.

> would significantly threaten the reelection chances of incumbent minority legislators, and furthermore I was determined to examine possibilities for expanding minority representation.

Certification of Professor Larry Bartels, J.S. App. at 57a.

Professor Bartels may have been well intentioned, but there can be no doubt that the Commission classified incumbents and certain candidates by race. The result was a plan that discriminated against non-minority incumbents and candidates by denying them the same level of protection and consideration given to those of other races.[4]

## B. The Absence of a "Compelling State Interest" Has Already Been Established.

Racial classifications will be upheld only when they are "narrowly tailored" to serve a "compelling state interest." *City of Richmond v. J. A. Crosson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267 (1986); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, (1978). This rule applies with no less force in the redistricting setting. *See, e.g., Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993).

Avoiding liability under the Voting Rights Act is normally cited as the compelling state interest in redistricting cases. Before such a compelling interest can be invoked, however, there must be a "strong basis in evidence" for finding the threshold conditions for section 2 liability by application of the three-pronged test in *Thornberg v. Gingles*, 478 U.S. 30 (1986). *King v. State Bd. of Elections, 979 F.Supp.* 619 (N.D. Ill. 1997), *aff'd,*

---

[4] "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432, (1984); *McLaughlin v. Florida*, 379 U.S. 184, 196, (1964); *Loving v. Virginia*, 388 U.S. 1, 11, (1967). See also *Miller v. Johnson*, 515 U.S. 900, (1995) (The "central mandate" of the Equal Protection Clause "is racial neutrality in governmental decision making.")

522 U.S. 1087 (1998). See also, *Bush v. Vera*, 517 U.S. 952, 994 (1996) (O'Connor, J. concurring).

The Court in *Gingles* held that a potential section 2 violation exists if the minority group in a given area is geographically compact, politically cohesive and potentially barred by majority bloc voting from electing its preferred candidate. *Thornberg v. Gingles*, 478 U.S. 30, 50-51 (1986).

The Apportionment Commission consistently argued that their approach did not violate the Voting Rights Act because of the absence of majority bloc voting. After a full trial on the merits in the *Page* case, the three-judge court agreed finding that "there was no credible evidence presented that 'a white bloc vote normally will defeat the combined strength of minority support plus white crossover votes." *Page v. Bartels*, 144 F. Supp. 2d 346, 366 (D.N.J. 2001).

There never was a compelling state interest in the New Jersey redistricting sufficient to justify the racial classification of individual incumbents and select candidates. Professor Bartels's concerns about the proportion of minority legislators to statewide minority populations do not serve to permit racial discrimination against non-minority incumbents and other candidates.[5]

---

[5] "[T]he mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight . . . Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." *City of Richmond v. J. A. Crosson Co.*, supra, 488 U.S. at 500, 109 S. Ct. at 725. This is especially true with respect to Professor Bartels's expressed concerns. In fact, section 2 of the Voting Rights Act expressly states: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. sec. 1973 (b).

### C. The Redistricting Plan is not Narrowly Tailored.

Even if there were a compelling state interest, the New Jersey plan is not narrowly tailored. Classification of incumbents by race was not necessary. The Republican map and the variations suggested by Professor Bartels's own staff all complied with the Voting Rights Act – and they did not suffer from the same constitutional infirmity as the adopted plan.

Professor Bartels's reliance on "other factors" had the effect of exalting the professor's analytical matrix over the central mandate the Fourteenth Amendment. It is surely possible for the Apportionment Commission to develop a plan that will not racially discriminate against certain incumbents and candidates. It should be required to do so.

## II. APPELLEES AND THE COURT BELOW MISAPPLY THE "PREDOMINANT FACTOR" TEST.

Appellees and the court below argue that *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny require a showing that race was the predominant factor in the drawing of district lines before a redistricting plan can be held to strict scrutiny. This application of the predominant factor test is misplaced because all of the cited cases are distinguishable on their facts.

The *Shaw* line of cases[6] involved challenges by white voters to newly drawn minority-majority districts. These cases frequently involved districts with bizarre shapes and scant direct evidence of legislative intent. The Court in these cases fashioned a test to determine whether the use of race was so predominant as to be tantamount to a racial classification.

---

[6] See, e.g. *Bush v. Vera*, 517 U.S. 952, 116 S. Ct. 1941, 135 L. ed. 2d 248 (1996), *Shaw v. Hunt*, 517 U.S. 899, 116 S. Ct. 1894, 135 L. Ed. 2d 207 (1996); *Miller v. Johnson* 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

There is no mystery in the present case. The undisputed record shows that incumbents and certain legislative candidates were classified by race. Protection and consideration were extended to some incumbents and candidates and not others on the basis of race and without regard to partisan affiliation.

Senator Robertson, Assemblyman Zecker, and other incumbents suffered a harm that was personal in a way not shared by the plaintiffs in the *Shaw* cases. The non-incumbent appellants were affected by the spillover of this policy as they faced a District 34 configuration in which race was the predominant factor. Three sister communities in Passaic County saw their collective influence diminish as the traditional redistricting principle of community of interest gave way to the desire to achieve a racial result.

The Shaw line of cases are very useful, however, in that they subscribe to the principle that: "'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Shaw v. Reno*, 509 U,.S. at 643-44, quoting *Brown v. Bd. of Education*, 347 U.S. 483 (1954).

The appellees in the present case claim that a clear racial classification must be subject to an additional predominant factor test before strict scrutiny will be triggered.. Such a claim is a plain misreading of the law that would reverse the presumption of invalidity set forth in *Brown*, *Shaw* and decades of Equal Protection precedent.

## III. THE APPEAL HEREIN WAS TIMELY FILED

The time limit for filing this appeal is 60 days. Title 28, Section 2101 (b) of the United States Code provides as follows regarding the time for appeals to this Court:

> Any other direct appeal to the Supreme Court *which is authorized by law,* from a decision of a district court in any civil action, suit or proceeding shall be taken

> within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final. (emphasis added).

The law authorizing this appeal to the Supreme Court is set forth in section 1253 of Title 28 of the United States Code:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding *required by any Act of Congress to be heard and determined by a district court of three judges*. (emphasis added.)

Section 2284 (a) of Title 28 of the United States Code sets forth the three judge requirement:

> A district court of three judges shall be convened . . . when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

Only the constitutional challenges to the statewide apportionment were required to be heard by the three-judge district court. The three judge court reached a final judgment on both such issues. A third issue deemed unrelated to the constitutional challenge to the apportionment was severed from the three-judge case and referred to a one-judge court.

The grant of summary judgment in the present case was full and final and the sixty day time limit applies. The notice of appeal within was filed on July 26, 2001. The three-judge district court's order was originally entered on June 14 and corrected on June 26, 2001.

## IV. *RES JUDICATA* PRECLUSION IS WHOLLY INAPPROPRIATE.

In addition to the strong policy arguments set forth in the Jurisdictional Statement, preclusion of the appellants' claims because of a decision in *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001), is inappropriate because: (1) the present matter does not share the same parties, claims or causes of action, and (2) the unique nature and timing of the *Page* case precluded intervention in the usual manner under the rules of court.

**1.** The *Page* case involved minority voter dilution claims, primarily under the Voting Rights Act. The present case involves harm done to non-minority incumbents and voters by the racial classification of incumbent legislators and certain candidates. The proofs in the two cases are entirely different.

Neither Senator Robertson nor Assemblyman Zecker were consulted prior to the filing of the complaint in *Page*, nor did they authorize the attorneys to file a complaint on their behalf. Neither legislator had any control over the *Page* litigation and could not issue instructions to the attorneys. They certainly gave no authority to the *Page* attorneys to waive any claims on their behalf. Moreover, the filing of the complaint in the present case was not coordinated with the efforts in *Page*.

The listing by *Page* counsel of "Assembly Republican Majority" and "Senate Republican Majority" as plaintiffs is not binding on the incumbent appellants herein. The appellants here are not in privity with any of the plaintiffs in *Page*.

**2.** Senator Robertson and counsel for the remaining appellants had an obligation to file their complaint in good faith and after diligent inquiry into the prospective claims. Still, the complaint here was brought just 16 days after the adoption of the new map. Unfortunately, this was only one business day before a full trial on the merits in *Page*, a case which had been filed within hours of the plan's adoption.

Rule 24 (b) of the Federal Rules of Civil Procedure provides for permissive intervention "upon timely application" when there are common issues of law or fact. Rule 24 (c) requires that this application be made by motion. Even if a court were to find common questions of law or fact, a motion made one day before trial would not have been timely. Similarly, the expedited timeline in *Page* worked against a court consolidating the trial of the two actions under Rule 42.

The appellants here acted diligently and without intent to "maneuver." The racial classification of incumbents caused injury to the incumbent appellants that was quite personal in nature and which could not be dealt with in a minority voter dilution case. *Res judicata* preclusion would create a grave injustice to the appellants and to the sane constitutional review of redistricting.

## CONCLUSION

There are no grounds to dismiss this appeal or to summarily affirm the errant lower court decision. Rather, the record is sufficiently undisputed as to allow for the summary reversal of the lower court ruling. This matter should be remanded to the district court with instructions to order the Apportionment Commission to adopt a new plan that does not discriminate among racial classifications of incumbents and that protects the incumbent appellants from retaliation for bringing this action.

Respectfully submitted,

NORMAN M. ROBERTSON
*Appearing Pro Se*

JAMES A. ROBERTSON
*As Attorney for Appellants Coiro, Kulick, Colletti, Schwartz, Gonzalez and Zecker*